Supreme Court, U.S.
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No. D 10-117

In The
Supreme Court of the United States

MICHAEL PHILLIP GENTILE, suing on behalf of himself and all other purchasers of Lots 418s through 519s, PINION HILLS RANCHES; MICHAEL PHILLIP GENTILE, an individual,

Petitioners,

v.

S.K. MADAN and SHOBHANA MADAN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Nevada

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Nevada Supreme Court held that a 1985 extension of a wholly due date in a Promissory Note secured by a Deed of Trust, revoked by acceleration in 1989 because conditions for granting the extension were not met, and then recorded in 2006 after the lien was extinguished according to both the accelerated and original wholly due dates, was effective to extend the date when the lien of the Deed of Trust is extinguished by the Statute of Repose.

1. Did the Nevada Supreme Court violate the rights of Petitioners under the Due Process and Equal Protection Clauses of the United States Constitution, Amendment XIV, Section 1, by ignoring the terms of the Promissory Note and Deed of Trust, its own finding in an earlier case, and the intent of the Nevada Legislature in enacting a ten-year Statute of Repose intended to extinguish the lien of deeds of trust and bring certainty to land titles in Nevada?

2. Do the Due Process and Equal Protection Clauses of the United States Constitution, Amendment XIV, Section 1, impose on the Nevada Supreme Court a duty of fidelity to Nevada statutory and case law, upon which Petitioners had a right to rely, as that law was at a given time?

3. Did the Nevada Supreme Court breach its duty of fidelity by its material impermissible judicial departure from Nevada statutory law enacted by the

QUESTIONS PRESENTED FOR REVIEW – Continued

Nevada Legislature and Nevada case law, in its adjudication in these cases?

4. Does the United States Supreme Court have jurisdiction to review the legal materials properly before the Nevada Supreme Court to make an independent determination of what Nevada statutory and case law, upon which Petitioners had a right to rely, was at the given time in order to ensure full enforcement of the Due Process and Equal Protection Clauses of the United States Constitution, Amendment XIV, Section 1?

5. Did the Nevada Supreme Court deprive Petitioner Michael Phillip Gentile, an individual, of his property in violation of the Due Process and Equal Protection Clauses of the United States Constitution, Amendment XIV, Section 1, by failing to recognize that the District Court had not given him, and the other individual owners, notice and opportunity to be heard and by applying, sua sponte, its Order in one case to five other separate and previously unconsolidated cases?

PARTIES TO THE PROCEEDINGS

Petitioners:

MICHAEL PHILLIP GENTILE,
Representative Petitioner

MICHAEL PHILLIP GENTILE,
Individual Petitioner

Respondents:

S.K. MADAN AND SHOBHANA MADAN

Parties No Longer Interested in the Outcome of This Case Who Have Been Served With Notice Pursuant to Rule 12.6:

Stewart H. Parker, Trustee of The Stewart H. Parker and Margery L. Parker Revocable Trust dated 5/15/92

Storey County, A Political Subdivision of the State of Nevada

Nevada Bankers Association, Amicus Curiae

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UNPUBLISHED ORDERS BELOW[1]

Order of Affirmance, Nevada Supreme Court, filed December 16, 2009. **App. 1.**

Order Declaring Lake Tahoe Recreational Land Company Deed of Trust Valid and Enforceable, First Judicial District Court, Storey County, Nevada, filed May 29, 2007. **App. 8.**

Order Re: CV-19959, First Judicial District Court, Storey County, Nevada, filed May 29, 2007. **App. 17.**

Order, CV85-01166A, First Judicial District Court, Carson City, filed May 24, 2007. **App. 18.**

Order Requiring Hearing on Pending Motions, First Judicial District Court, Storey County filed June 15, 2006. **App. 20.**

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Order: Denying Rehearing, Nevada Supreme Court, filed February 16, 2010. **App. 31.**

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[1] Storey County and Carson City are in the First Judicial District. The Declaratory Relief Action was brought in Storey County. Four individual owners brought Quiet Title actions in Storey County. The Class Judgment was granted in Carson City. The Class brought a Supplementary Proceeding in Carson City in 2006. The District Court did not consolidate the six cases. The Supreme Court consolidated the six cases.

BASIS FOR JURISDICTION IN THIS COURT

The Nevada Supreme Court entered its unpublished Order on December 16, 2009. **App. 1.** Petition for Rehearing was denied in an unpublished Order entered on February 16, 2010. **App. 32.** An extension of time until July 16, 2010 to file a petition for writ of certiorari was granted on May 4, 2010. This Court has jurisdiction under 12 U.S.C. § 1257(a) to consider a final order of the highest court in Nevada which is subject to no further review or correction in any other Nevada tribunal.

Rule 12.5 is not applicable

Rule 29.4(b) notifications are not applicable

CONSTITUTIONAL PROVISIONS AND STATUTES

Article I, Section 10.

"(1) No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."

Article VI

"(2) This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the

Constitution or Laws of any State to the Contrary notwithstanding."

Amendment V (1791)

" . . . nor shall private property be taken for public use without just compensation."

Amendment XIV (1868) Section 1

" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

United States Code 12 U.S.C. § 1257(a)

Nevada Revised Statutes

NRS 40.433	**App. 34**
NRS 106.240	**App. 34**
NRS 107.080	**App. 35**

STATEMENT OF THE CASE

A. Introduction.

The Nevada Supreme Court (Supreme Court) established a new standard, contrary to that intended by the Nevada Legislature (Legislature) and its own previous finding, for determining the trigger date in a Statute of Repose and, in effect, increased the number of years before a lien is extinguished. NRS 106.240 **App. 34.** The Supreme Court made a

material and impermissible judicial departure from well settled Nevada law, and, in so doing, it deprived Petitioners of their property in violation of the Due Process and Equal Protection Clauses of the United States Constitution, Amendment XIV, Section 1 (Constitutional Command).

To hold as it did, the Supreme Court had to ignore:

(1) the fact that it found an original wholly due date in the promissory note, not the deed of trust, which triggered the Statute of Repose and extinguished the lien of the deed of trust 10 years later in *Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 16 P.3d 1074 (2001);

(2) the original wholly due date in the Promissory Note in this case;

(3) universally recognized contract law of acceleration clauses;

(4) its own longstanding precedent recognizing acceleration clauses;

(5) the statutory scheme that governs deeds of trust and allows for acceleration of wholly due dates in promissory notes and deeds of trust;

(6) the undisputed evidence of the exercise of the options to accelerate; and

(7) the fact that no action was taken to record a written extension or to collect on a Promissory Note before the Statute of Repose extinguished the lien of a

Deed of Trust according to the original and accelerated wholly due dates.

The Supreme Court also did not address the fact that the District Court did not give notice to or an opportunity to be heard to four individuals, but ruled on their quiet title cases by applying its Order from another case without consolidating the cases. Mr. Gentile, an individual, was deprived of his rights under the Constitutional Command.

Petitioners had a right to conduct their affairs in reliance on well settled property and contract law, Nevada cases recognizing that law, and the statutory deeds of trust scheme established by the Legislature. The undisputed facts and the law favored Petitioners. Because there is little analysis in the unpublished Order and what is there contradicts findings in an earlier case, *Pro-Max, supra*, while failing to acknowledge the accelerated and original wholly due dates, it is impossible to determine why Petitioners were deprived of their property in violation of the Constitutional Command. A wrong of constitutional dimension has occurred. This is an area in which the Constitution requires This Court to undertake an independent, if still deferential, analysis of Nevada law. *Bush v. Gore*, 531 U.S. 98 (2000); E. Gressman, K. Geller, S. Shapiro, T. Bishop, E. Hartnett, *SUPREME COURT PRACTICE* (9th Ed. 2009), p. 142 (hereinafter, Gressman).

B. Facts Material to Consideration of the Questions.

Key Points Regarding Lien: In 1979, a Promissory Note with the wholly due date of August 30, 1991 and a Deed of Trust securing the Promissory Note were written, encumbering land in Storey County, Nevada.[2] Both the Promissory Note and Deed of Trust contained terms allowing for acceleration.[3] In 1985, the original parties agreed to extend the wholly due date to 1996 if certain conditions were met, but did not authenticate or record the extension. **App. 60.**

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[2] "The Deed of Trust was given 'For the Purpose of Securing' payment and performance covenants including the Promissory Note. The Deed of Trust contains this language:

> **'Payment of the indebtedness evidenced by one promissory note of even date herewith, and any extensions or renewals thereof, in the principal sum of $1,542,000.00 executed by Trustor in favor of Beneficiary or order.'"** Appellant's Opening Brief, (AOB), pp. 7-8. **App. 43.**

[3] "Should default be made in payment of any installment when due the whole sum of principal and interest shall become immediately due at the *option* of the holder of this note." AOB, p. 7. **App. 40-41.**

"X. (a) Should default be made . . . , then Beneficiary may declare all sums secured hereby immediately due by delivery to Trustee of a written declaration of default and demand for sale, and of written notice of default and election to cause said property to be sold (which notice Trustee shall cause to be filed for record). . . ." AOB, p. 8. **App. 52.**

Because the note was in default (conditions for the extension had not been met), the acceleration clause was exercised by recorded notice in 1989.[4] This accelerated the 1996 extension date and the 1991 original wholly due date to 1989. Nevada has a Statute of Repose providing that the lien of a deed of trust is extinguished 10 years after the Promissory Note is wholly due according to the terms thereof or any recorded written extension thereof. **App. 34.** Thus, in 1999, the lien was extinguished by the Statute of Repose based upon the accelerated wholly due date. The District Court and Supreme Court ignored the accelerated 1989 wholly due date.

In 2001, the 10 year anniversary of the original wholly due date in the Promissory Note was reached. Still no action had been taken to collect the debt or record the revoked extension. As with the accelerated wholly due date, neither the District Court nor the Supreme Court recognized the original wholly due date and subsequent extinguishment of the lien 10 years later. This contradicted the Supreme Court's finding of fact in *Pro-Max, supra*, in which the

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[4] "NOTICE IS HEREBY GIVEN that ... there has been a default in the payment ... due September 1, 1987 defined as "Short Fall" *in that certain Modification Agreement dated September 4, 1985 ...* ***it is hereby declared that the whole of said unpaid amount of said note and all other sums secured by said Deed of Trust is immediately due and payable***. ..." (emphasis added) AOB, p. 9. **App. 55-56.**

Supreme Court recognized the original wholly due date in a promissory note and the extinguishment of the lien 10 years later.

An unauthenticated copy of the revoked 1985 extension was recorded in 2006, 21 years after it had been written. **App. 58-64.** The District Court and the Supreme Court accepted the extended wholly due date (1996) to find that the lien had not been extinguished.

By recognizing an extension agreement recorded 7 years after the lien was extinguished according to the accelerated due date, the Supreme Court, in effect, extends the Statute of Repose from 10 years to 17 years, thus setting a new standard completely at odds with the intent of the Legislature.

District Court Proceedings: A Class[5] of defrauded property owners obtained a judgment in its favor in 1990 (Judgment). Due to insolvency of the Debtors,[6] the Class was unable to collect its

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[5] The Class was certified in 1987 with Mr. Gentile as Representative Plaintiff.

[6] Debtors are JOTI Development Corporation, a defunct Nevada Corporation (JOTI) the fee simple owner of 31 parcels. John L. Gean M.D. (deceased) the fee simple owner of 4 parcels. San Jacinto Savings Association, a Texas Savings and Loan (San Jacinto), a successor to the original secured creditor is beneficiary under the Deed of Trust. Resolution Trust Corporation (RTC) became Receiver of San Jacinto in 1990. The Trustor is JOTI. Dr. Gean is majority shareholder of JOTI. It is noted that "Deed of Trust" in this Petition is that which JOTI granted to San Jacinto's predecessor to secure the Promissory Note in

(Continued on following page)

judgment, which was renewed every six years. However, The Judgment Debtors did own 35 parcels of land in Storey County, Nevada. San Jacinto gave Notice of Default in which it exercised the option to accelerate the maturity dates in 1989, specifically including the unrecorded 1985 extension. **App. 56.**

RTC, the San Jacinto Receiver, took no action until it sold the note to Respondents in 1994. Respondents recorded the RTC assignment nine years later in 2003. They did nothing to collect payments due, nor did they record the revoked 1985 extension before the accelerated or original wholly due dates were reached. The lien of the Deed of Trust was extinguished by the 10 year Statute of Repose in 1999 according to the accelerated wholly due date and in 2001 by the original wholly due date.

The Class began to levy on the 35 parcels to satisfy its judgment and filed a Complaint for Declaratory Relief on September 9, 2005.[7] Respondents filed a Motion to Dismiss attacking the Representative Plaintiff's standing to pursue collection of the

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payment for 102 40-acre parcels. As parcels were fraudulently sold to 50 Class members, including Mr. Gentile and three other individuals who brought the Quiet Title actions, the individual property owners granted an all-inclusive deed of trust to JOTI.

[7] The Declaratory Relief Action was indicated because Respondents had recorded their assignment and begun to pay property taxes.

Judgment on behalf of the Class.[8] The Motion diverted the District Court's attention from, and led to a gross misunderstanding of, The Complaint resulting in the seriously erroneous first Order made on April 25, 2006. **App. 30.**

The April 25, 2006 Order denied Respondents' Motion to Dismiss ("purported class action") and gave the Representative Plaintiff the following alternatives: " . . . amend the complaint to allege a single cause of action or to address what authority they have to pursue this case as a single plaintiff seeking to recover an entire class judgment or, in the alternative, to allege that the plaintiffs qualify as a class to be verified by the court." **App. 30.** The Representative Plaintiff's resistance to the clearly erroneous Order created frustration in the District Court, antipathy towards the Declaratory Relief Action, and confusion related to the existing Class seeking to collect its judgment as separate from the actions of the individual owners.[9]

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[8] The Motion would not have been possible, and the efforts to undo the misunderstanding would not have been necessary, if the Supreme Court's holding in *Dancer v. Golden Coin Ltd.*, 124 Nev. Adv. Op. 2, 176 P.3d 271 (2008) had been available (Class Representative has standing).

[9] Mr. Gentile, as an individual, and three other individual owners obtained judgments quieting title on their individual parcels in 1998-2005. Respondents set aside these judgments. Two individual cases settled at Supreme Court Settlement Conference. Mr. Parker, an individual, did not settle but does not join in this Petition. The Supreme Court ordered that Mr.

(Continued on following page)

On June 9, 2006 the District Court Ordered a hearing on the pending motions. That Order narrowly defined the purpose of the hearing (" . . . to clarify Plaintiff's motions. . . . ") and was directed to counsel for The Representative Plaintiff, Respondents and Storey County. **App. 21-22.** It did not give notice and opportunity to be heard to the Plaintiffs in the individual cases including Mr. Gentile and his District Court counsel.

At **the July 21, 2006 hearing**, as ordered, The Representative Plaintiff clarified the Complaint for Declaratory Relief. The Transcript and exhibits are in the record before the Supreme Court. Specifically, the Promissory Note stating the wholly due date, the Deed of Trust, and the affirmative exercise of the options to accelerate by the recorded Notice of Default were graphically illustrated. **App. 40, 42, 55, 65.** This hearing with its narrowly defined purpose of clarification was the only hearing held before the District Court issued its final Order raising substantial federal questions. There was no evidentiary hearing in the Class or individual cases. There was no trial. The four individual quiet title cases were not included in the hearing.

On **May 27, 2007**, the District Court issued an Order **App. 8** declaring, sua sponte, that there was

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Gentile's individual case be briefed on appeal by his counsel as Representative Plaintiff.

but a single issue in the Class and individual cases and further declaring that the lien of the Deed of Trust was not extinguished. Given the limited purpose of the July 21, 2006 hearing it was astonishing to find the May 27, 2007 Order summarily dispose of 6 cases the District Court had not consolidated wherein five parties[10] had no notice and the opportunity to be heard and the Representative Plaintiff appeared only with notice that he was " . . . to clarify. . . . " **App. 21.** Mr. Gentile, as an individual, was deprived of his quiet title rights and his right to contest the lien and other defenses to his individual all-inclusive deed of trust in violation of the Constitutional Command. In addition, in its Order, the District Court had ignored the accelerated wholly due date in the recorded Notice of Default and ignored the original wholly due date in the Promissory Note, in contradiction to *Pro-Max, supra*. Both dates were presented at the July 21, 2006 hearing. The District Court accepted the wholly due date in the revoked and unauthenticated copy of the 1985 extension agreement, recorded twenty one years after it was written, to declare that the lien was not

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[10] The five parties were the four quiet title Plaintiffs, including Mr. Gentile, as an individual, and the Supplementary Proceeding in the Class Judgment case. Mr. Gentile's individual lawyer was present as an observer, only. The four individual Plaintiffs were not given notice to appear. Two individual Plaintiffs settled at Supreme Court Settlement Conference. Mr. Parker does not join in this Petition.

extinguished. **App. 63.** Appeal was taken to the Supreme Court.

Supreme Court Proceedings: The Supreme Court **December 16, 2009 Order** (Order), **App. 1**, upheld the District Court, again ignoring the acceleration clauses as terms of the Promissory Note and Deed of Trust. See: Footnotes 2, 3, 4. The undisputed fact is that any wholly due date (original, extended or even not stated) of the Promissory Note and Deed of Trust was accelerated in the statutory manner by the Notice of Default 1989. **App. 55.** The Supreme Court also failed to recognize the original wholly due date in the Promissory Note in contradiction of its finding of fact in *Pro-Max, supra*, even though deeds of trust and promissory notes are viewed as one contract. When separate writings, and especially those which refer to each other by reference, as in these cases, "are executed between the same parties at the same time, in the course of and as part of the same transaction, and intended to accomplish the same general object they are to be construed as one and the same instrument." *Cafritz Const. Co. v. Mudrick, et al.*, 59 F.2d 864 (D.C. Cir. 1932). This elementary rule is recognized in This Court. *Moline Plow Co. v. Webb, et al.*, 141 U.S. 616 (1891). This Court also recognizes the related rule that the Promissory Note is the "principal thing" and the Deed of Trust is "mere security." *Railway*

Company v. Sprague, 103 U.S. 756, 26 L. Ed. 554 (1880).[11]

There is no indication that the Supreme Court considered the trigger date in the Notice of Default or the legal effect of lien extinguishment prior to the recording of an extension. In effect, The Supreme Court extended the Statute of Repose years beyond the Legislature's intent to efficiently clear land titles in ten years.[12] Petitioners briefed the well settled Nevada law that applied to the acceleration terms of the Promissory Note and the Deed of Trust:

"***The contract required it:*** That time is of the essence is an expressly agreed material term in the contract of the parties incorporated in The 1985 Extension, and in the exercise of the Options to accelerate. . . . *Lake v. Lewis*, 16 Nev. 94 (1881); *R & S Investments v. Howard*, 95 Nev. 279, 593 P.2d 53 (1979)." AOB p. 13.

"***Nevada Law required it:*** '. . . *if acceleration is permitted by the obligation secured by the deed of trust*. . .', NRS 107.080.3. . . .; *Lubritz v. Circus*

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[11] Petitioners briefed "The contract components and the statutes must be construed together" and "This Court has found that the debt is the principal thing – The Deed of Trust is a mere incident of the debt." Appellant's Reply-Answering Brief, pp. 9, 11 (ARAB).

[12] "Many states have similar statutes which extinguish the deed of trust lien absolutely on the passage of time. AOB, p. 20 citing: Paul E. Basye, Clearing Land Titles (2d Ed. 1970) (hereinafter, Basye 2d Ed.), referring to NRS 106.240. **App. 34.**

Circus Hotels, Inc., 101 Nev. 109, 693 P.2d 1261 (1985). The acceleration clauses at issue are optional at the Holder's option: ' . . . shall become immediately due at the option of the holder of this note.' ' . . . Beneficiary may declare all sums secured hereby immediately due. . . .' *Clayton v. Gardner*, 107 Nev. 468, 893 P.2d 997 (1991); 55 Am.Jur.2d *Mortgages* § 488, at 1." AOB p. 14. **App. 36, 41, 52.**

"***Universal acceptance of acceleration clauses required it:*** The general concept and validity of acceleration clauses is universally accepted. . . . *Lubritz v. Circus Circus Hotels, Inc., supra.*" AOB p. 14.

"***The exercise matures The Debt for all purposes:*** . . . 2 GARRARD GLENN, MORTGAGES DEEDS OF TRUST, AND OTHER SECURITY DEVICES AS TO LAND § 149, at 838 (1943)." AOB p. 14.

"***There was an effective exercise of the options to accelerate***: . . . 16 CAUSES OF ACTION 391 *Cause of Action to Accelerate Maturity of Debt* §§ 3 and 4, at 11-12, and at 13 (2006)." AOB pp. 15-16.

Petitioners briefed the Supreme Court on the wholly due date in the Promissory Note as well:

"The original Promissory Note Maturity Date is August 30, 1991" AOB p. 7.

"The Maturity Date of August 30, 1991 can be readily ascertained from the Promissory Note, in possession of the Holder/Beneficiary it secures." AOB p. 8.

C. The Substantial Federal Questions.

The Judgment[13] (now exceeding $15 million) meets the federal definition of Constitutional property in the Due Process Clause that the Supreme Court must respect. As a matter of federal law This Court (in tax lien cases) has interpreted the term "property" as "every species of right or interest protected by law and having an exchangeable value," and as under the "bundle of sticks" analysis. *United States v. Craft*, 535 U.S. 274, 278-79, 284-85 (2002); H. Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 Colum. L. Rev. 1919, 1942, 1945 (2003) (hereinafter, Monaghan); R. Fallon, J. Manning, D. Meltzer, D. Shapiro, Hart and Weschler's *The Federal Courts and the Federal System* (6th Ed. 2009), p. 488 (hereinafter, Hart and Weschler).

The Order was a shock given the contradiction with the facts found in *Pro-Max, supra*, the ignored facts in this case, and the well settled law ignored in the clearly erroneous District Court May 27, 2007 Order in which the individual cases were not consolidated, yet were included in the outcome, without opportunity to be heard in District Court. It made a radical, material, arbitrary, substantial and impermissible judicial departure from the Nevada law, breached the Supreme Court's duty of fidelity to antecedent Nevada law on which Petitioners had a

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[13] and Mr. Gentile's parcel.

right to rely, and deprived Petitioners of their property in violation of the Constitutional Command.

- When the Supreme Court has recognized the wholly due date in a promissory note in a precedent case, Petitioners have a right to expect that the Supreme Court will recognize the wholly due date in this Promissory Note, **App. 40**, and not declare that the wholly due date must be on the face of the Deed of Trust.

- When the Statute of Repose indicates "according to the terms thereof" and the acceleration clause is a term of both the Promissory Note and the Deed of Trust, Petitioners have a right to expect the Supreme Court to acknowledge that legal term and the statutes implementing the term. **App. 41, 52.**

- When "terms thereof" such as an original wholly due date in the Promissory Note, **App. 40**, and the timely and "appearing of record" accelerated wholly due date, **App. 56**, are undisputed and have clear contractual meaning, Petitioners have a Due Process and Equal Protection right to expect them to be recognized.

- When the Statute of Repose, NRS 106.240, clearly sets a 10 year time period during which some action to preserve rights under a debt secured by real estate must be taken, and no action occurs, Petitioners have a Due Process and Equal Protection right to expect that the lien of the Deed of Trust is extinguished. **App. 34.**

- When the Legislature has set, by statute, a 10 year period for taking action to preserve rights under a debt secured by real property before the lien is extinguished, Petitioners have a Due Process and Equal Protection right to expect a revoked extension agreement recorded after the 10 year period has expired to have no legal effect. **App. 58.**

- When the 1985 extension wholly due date has been accelerated and there is a Notice of Default 1989 " . . . appearing of record . . . ", **App. 55**, that the conditions for earning the extension have not been met, and only an unauthenticated copy, **App. 64**, that was not recorded before the date it extends has expired, Petitioners have a Due Process and Equal Protection right to expect that it will not take precedence over the legally binding terms of the Promissory Note and Deed of Trust. **App. 40, 42.**

- When the four individual owners were not given notice and an opportunity to be heard or give evidence at the District Court Hearing, and they appealed the violation of the Constitutional Command to the Supreme Court, Petitioner, Mr. Gentile, has a Due Process and Equal Protection right to expect that the Supreme Court will act upon this violation of his federal rights.

By ignoring two wholly due dates and recognizing a revoked 1985 extension agreement bootstrapped into the recording system 21 years after it was prepared, **App. 58**, the District Court made

egregious errors depriving the Class and the individuals of their property in violation of the Constitutional Command. The Order did not address the undisputed and essential facts of the cases, or the well settled law thereon; or the fact that according to the terms of the Promissory Note and the Deed of Trust, the lien of the Deed of Trust had already been extinguished by the Statute of Repose before the revoked extension agreement was recorded. Endorsement by the Supreme Court of the clearly erroneous District Court Order, and failure to consider the federal and nonfederal issues is, itself, the violation of the Constitutional Command and establishes jurisdiction in This Court.

Specifically, and in whole, the record shows that the federal questions arising from the District Court May 27, 2007 Order were brought to the attention of the Supreme Court with fair precision and at the earliest time at all possible stages. The Supreme Court was presented with every proper opportunity to address the clearly erroneous District Court Order that deprived Mr. Gentile as an individual and the other individuals of their right to notice and opportunity to be heard under the Constitutional Command.

- The Docketing Statement raised the federal question:[14] "an issue arising under the United States and/or Nevada Constitutions."

  "We believe that the application of an order entered in another case in 2007 to invalidate a 1998 judgment violates the Due Process Clause since the Appellants here were not parties in the other case."

- Petitioners specially set up and raised the federal questions in Appellants' Opening Brief and Oral Argument:

  "Did the District Court err in applying, sua sponte, its Order in one case to five other separate cases?" AOB, p. 3.

  "The Due Process property rights of The Parties to the 5 other cases were violated since they had no notice and opportunity to be heard." AOB, p. 33.

  "The District Court exceeded its authority and did not recognize the due process right to notice and opportunity to be heard." AOB, p. 28.

  "The parties . . . had a due process right to notice and opportunity to be heard before the Order from another case, in a separate Court, was applied, sua sponte. AOB," p. 30.

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[14] Consolidated Case 49733, NRAP 14.

• The individuals had no opportunity to present evidence about issues such as laches, estoppel, and fraud.[15]

• The unexpected Order was challenged with the Petition for Rehearing. It summarized the consequences of the ignored undisputed facts, the contradiction with the finding in *Pro-Max, supra*, the ignored well settled law, and the radical expansion of the Statute of Repose far beyond anything intended by the Legislature, and clearly presented each of the elements of the violations of the Constitutional Command. **App. 71-85.**

The District Court's May 27, 2007 Order from which the appeal was taken decided the cases against Petitioners and the other parties without their having a proper opportunity to present their evidence. All parties took that issue to the Supreme Court with their appeals. Petitioners took up all issues again with their Petition for Rehearing. It would leave a serious gap in the remedy for infraction of the constitutional rights if Petitioners could not come to This Court. *Saunders v. Shaw*, 244 U.S. 317, 320 (1917). Gressman, p. 196.

The treatise questions determine if the Supreme Court has an independent nonfederal ground, free of

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[15] Mr. Parker's appellate counsel arguing the individual cases. En Banc, August 30, 2009.

entanglement with the Constitutional Command, for its Order. If so, the inquiry is whether the state ground is adequate to sustain the Order. If there is no independent and adequate state ground to sustain the Order, This Court has jurisdiction to consider this Petition. Gressman, p. 208.

Petitioners' property has been taken in violation of the federal Due Process and Equal Protection Clauses. The Supreme Court ignored undisputed facts and the well settled Nevada law thereon and then made a radical judicial alteration in the Nevada Statute of Repose and statutory scheme enacted by the Legislature. In these cases it is not possible to resolve the federal Due Process and Equal Protection violations without resolving the Statute of Repose issues related to Nevada law.

These issues are ***not*** logically and functionally distinct from the federal law issue. They are antecedent to resolving the federal issue, according to the distinction made by This Court. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875); *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304 (1816).

The Nevada law issue must be resolved as a necessary antecedent to resolving the federal law issue:

> " . . . where a state law ruling serves as an antecedent for determining whether a federal right has been violated, some review of the basis for the state court's determination

> of the state-law question is essential if the federal right is to be protected against evasion and discrimination. . . . See H. Weschler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and logistics of Direct Review*, 34 Wash. & Lee L. Rev. 1043, 1050-56 (1977)." (hereinafter, Weschler). Hart & Weschler's The Federal Courts and The Federal System (6th ed. 2009), pp. 457-58; Gressman, pp. 143-44.

Questions concerning the acceleration of all wholly due dates and extinguishment of the lien before the revoked extension was recorded were raised and ignored.[16] This raises an issue similar to

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[16] **Q.** Did The District Court err in accepting the August 30, 1996 extended wholly due date rather than the ***accelerated*** March 28, 1989 wholly due date in finding The Deed of Trust valid and enforceable?

A. Yes. The August 30, 1996 extended wholly due dates of The Debt and The Lien were ***accelerated*** to **March 28, 1989** and, as a result, The Lien of The Deed of Trust terminated on **May 2, 1999**. (Emphasis added)

Q. Did the Deed of Trust become unenforceable on May 2, 1999 pursuant to NRS 106.240?

A. Yes. The accelerated wholly due date of The Promissory Note ("The Debt") is **March 28, 1989**. The NRS 106.240/NRS 107.080.3 10 years and 35 days period ended **May 2, 1999**. "The Lien" of the Deed of Trust terminated on May 2, 1999. The deed of trust became unenforceable on **May 2, 1999**.

Q. Did The District Court err in admitting an unnotarized and unacknowledged copy of an extension agreement which was attached to another document which was recorded?

A. Yes. There is authority in NRS 111.240, NRS 111.265, and NRS 111.310 indicating that The 1985 Extension should

(Continued on following page)

the misconstruction of state property forfeiture, title by escheat, and zoning laws which had to be independently evaluated by This Court to protect the federal treaty guarantees and rights under the Takings Clause. In this case, the federal laws are the Due Process and Equal Protection Clauses. *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1982); Hart and Weschler, pp. 457-58; Gressman, pp. 143-44.

For example, recently This Court addressed its need to independently evaluate state property law when there has been a violation of a provision of the Constitution:

> "Similarly, our jurisprudence requires us to analyze the 'background principles' of state property law to determine whether there has been a taking of property in violation of the Takings Clause." *Bush v. Gore*, *supra*, footnote 1.

In another Takings Clause case, This Court examined state law to determine if private beach property had been taken by state court action in violation of the Takings Clause. *Stop the Beach Renourishment Inc. v.*

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have been acknowledged and then recorded to meet the requirements of NRS 106.240. The copy was not acknowledged and could not be recorded – on its own. AOB, pp. 32-33.

Florida Department of Environmental Protection, et al., No. 08-1151, June 17, 2010.

> "If a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law. The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power. And This Court has long recognized that property regulations can be invalidated under the Due Process Clause. (Citations omitted) It is thus natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights." *Stop the Beach*, *supra*. (Justice Kennedy's concurring opinion).

The affirmative exercise of the options to accelerate the wholly due date of the debt established the wholly due date of record in the manner provided by the antecedent Nevada law. **App. 34, 36.** The antecedent Nevada law issue was not addressed. The Order, ignoring the facts and the antecedent law, is based upon a material impermissible judicial departure from Nevada laws which distort them beyond what a fair reading required and establishes a new standard that is a radical departure from that enacted by the Legislature, thereby depriving Petitioners of their property rights in violation of the Constitutional Command.

The Supreme Court recognized recording of the unauthenticated 1985 agreement attached to a cover memo with Respondents' attorney's notarized signature 21 years after the document was written.[17] **App. 58-59.** If the Supreme Court wishes to hold that unauthenticated documents may be recorded under its interpretation of the recording statutes and the holding has no impact on any federal question, This Court would undoubtedly hold that this was not, as such, an issue for review by This Court. However, in Petitioners' cases, the Order violates the Constitutional Command. Interpretation of the Statute of Repose by ignoring statutory recording requirements, acceleration clauses, and the original wholly due date is not judging. This is rewriting Nevada Law in usurpation of the constitutional grant of authority to the Legislature to write the laws upon which Petitioners' right to rely is of constitutional stature.

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[17] NRS 106.240 requires a 'recorded written extension.' **App. 34.** There is none. "Documents tendered for recording in Nevada must be acknowledged or have an alternate proof of execution. NRS 111.310; NRS 247.120. If the document is one affecting title to real or personal property,' it must be 'acknowledged by one of the persons listed in NRS 111.265; NRS 240.1635; NRS 111.310. If the document is one *not* 'affecting title,' to be recorded it must be a document described in NRS 247.120.1(b)(c)(d)(e)(f)(o)(q). These exceptions to acknowledgment are characterized by another form of proof of execution (. . . marriage certificates . . .)." ARAB, p. 21.

Thus there is no independent nonfederal ground free of entanglement with the Constitutional Command, and therefore no adequate state ground, to serve as a basis for relief, and for this reason This Court has jurisdiction.

The Order holds the lien is not extinguished. The Petition for Rehearing has been denied. Respondents are free to foreclose. When foreclosure is completed, all property rights of the Class and individual owners will be extinguished. These cases are concluded. Gressman, p. 164. There is no further discretionary action on the validity of the Deed of Trust that will take place. The Order is not just interlocutory. It is the final word of the final court in which a decision on some federal question could be had. *Market Street R.R. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945); Gressman, p. 155. Because the lien is not extinguished nothing other than ministerial acts remains to be done. *Department of Banking v. Pink*, 317 U.S. 264, 267 (1942); Gressman, pp. 155-56.

REASONS TO GRANT WRIT

Bush v. Gore provides authority for This Court to review the antecedent state law.

This Court's historical authority over judgments of state courts was based on the fundamental and interlocking principles enunciated over the years in three cases. *Murdock, supra*; *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Hortonville Joint Sch. Dist. No. 1 v.*

Hortonville Educ. Ass'n, 426 U.S. 482; Monaghan, p. 1924. In *Bush v. Gore, supra*, This Court held that The Supreme Court of Florida had made a material judicial departure from the Florida statutory scheme for Florida elections and in so doing had violated Article II, Section 1, Clause 2 of the Constitution. This Court determined that it had jurisdiction to examine the legal materials before the Florida Supreme Court to make an independent determination of what the prior Florida law was in order to ensure full enforcement of the Constitution. This Court determined that the extension of the manual recount date constituted an invalid alteration of the Florida legislative framework and halted the recount because it violated the Equal Protection Clause.

Generally, This Court should accept the determination of the Supreme Court on the meaning of the Nevada statutory scheme so long as it had fair or substantial support in Nevada law. However, as in *Bush v. Gore, supra* (dealing with Article II), Amendment XIV, Section 1 imposes a duty of fidelity to the antecedent state law on the Supreme Court. In Petitioners' cases, the antecedent state law is the well settled statutory and case law of contracts and property, including acceleration clauses and the statutory scheme for exercising them, all of which were ignored. Here the violation of the Constitutional Command turns on the resolution of the ignored antecedent state law. The question is whether the Supreme Court's constitutionally impermissible judicial departure from and ignoring of Nevada law breached its

duty of fidelity to that law, and for this reason the Order is open to examination by This Court to determine what the antecedent Nevada law is.

This Court has jurisdiction to examine the legal materials properly before The Supreme Court to make an independent determination of what the antecedent law in the statutory scheme and in *Pro-Max, supra*, was in order to ensure full enforcement of the Constitutional Command. This legal federal question should be fully examined and resolved by This Court – not by The Supreme Court. *Bush v. Gore*, *supra*, *Fairfax's Devisee, supra*; *Lucas, supra*; Weschler, p. 1054; Monaghan, pp. 1924-26; Gressman, pp. 143-44.

This Court has, under the Supremacy Clause, authority to review state court determinations of state law in Constitutional cases. This it did in *Bush v. Gore*, *supra*.

> "Thus, in *Bush v. Gore*, no member of the Court denied that some review of the state court's interpretation of Florida electoral law fell within the Court's appellate jurisdiction." Monaghan, p. 1957.

The Supreme Court reversed its holding in *Pro-Max*:

In its Order, the Supreme Court declared that the plain language of the Statute of Repose can be read in one way only – that it requires the original wholly due date to be on the face of the Deed of Trust.

Those words cannot be found in the statute.[18] **App. 34.**

That declaration is diametrically opposite to the Supreme Court's holding in *Pro-Max*, *supra*, in which it found the original wholly due date in the Promissory Note and found that the lien was extinguished 10 years later by the Statute of Repose.

> "NRS 106.240 creates a conclusive presumption that a lien on real property is extinguished ten years after the debt becomes due . . . the deeds of trust were conclusively presumed to have been satisfied in 1994, which is ten years after the notes became due. . . ." *Pro-Max*, *supra*. AOB, 18, ARAB, 5.

The Promissory Notes and Deeds of Trust in this case and in *Pro-Max*, *supra*, both utilize standard forms, typical of the vast majority of promissory notes and deeds of trust in Nevada. Both Deeds of Trust were recorded. Neither contains the wholly due date.

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[18] "The phrase "at the expiration of 10 years" is an adverbial preposition which is itself modified by the adverbial clause "after the debt become wholly due." From this, the sentence is: the lien shall terminate at the expiration of 10 years after the debt become(s) wholly due(FN). "According to the terms thereof or any recorded written extension thereof" modifies "become wholly due." That is, the debt becomes due according to the terms thereof or any recorded written extension thereof. "Thereof" refers to the debt or any extension of the debt secured by the mortgage or deed of trust. Thus, the phrase is: "according to the terms of the debt secured by the mortgage or deed of trust or to the terms of any recorded written extension of the debt secured by the mortgage or deed of trust." ARAB, pp. 2-3.

Both reference the wholly due date in the Promissory Note. Both Promissory Notes contain the wholly due date. Neither was recorded, as is standard practice. There are no differences in these documents or in their recordation that could account for this critically disparate interpretation of Nevada's Statute of Repose. The Supreme Court did not acknowledge that it reversed its holding in *Pro-Max, supra,* yet that is exactly what it has done, depriving Petitioners of their property in violation of the Constitutional Command.

Given that the vast majority of promissory notes contain the wholly due date, it makes sense that the Legislature intended parties to find the original wholly due date in the Promissory Note, not in the Deed of Trust. There would be no reason for the Legislature to enact a statute of repose that applies only to the rare transaction in which the wholly due date appears on the face of the Deed of Trust, and excludes standard forms (originally recommended by the National Conference of Commissioners on Uniform State Laws) used in the overwhelming majority of deeds of trust, including hundreds of thousands of federally insured documents used in the lending and title industries. ARAB, p. 8.

Furthermore, the Supreme Court's interpretation departed radically from universally recognized principles and This Court's holdings that Promissory Notes and their corresponding Deeds of Trust are to be construed as one instrument. See: **Supreme Court Proceedings (this brief)**, *Cafritz Const. Co.,*

supra, Moline Plow Co., supra. The Supreme Court previously recognized that "the debt is the principal thing, and the mortgage is but a mere incident," noting that the mortgage was subsequently barred by the statute that preceded NRS 106.240. *Laffranchini v. Clark*, 39 Nev. 48, 153 P. 250 (1915). ARAB, p. 10. For these reasons, all briefed to the Supreme Court, it was a total surprise that the Supreme Court ignored the wholly due date in the Promissory Note.

In ignoring the wholly due date in the Promissory Note as a trigger for the Statute of Repose, the Supreme Court failed to recognize that the lien was extinguished five years before the revoked extension was recorded. An extension that has been accelerated and not recorded before the lien is extinguished can have no legal standing. To recognize such an extension defeats the intent of the Statute of Repose.

This contradiction has serious consequences.

In interpreting Nevada's statute of repose and deed of trust law to require a wholly due date in the deed of trust in contradiction to its finding in *Pro-Max, supra*, and the recognized relationships of deeds of trust and promissory notes, the Supreme Court established a new standard, and impermissibly distorted the laws beyond what a fair reading required, in violation of the Constitutional Command.

Nevada has a statutory scheme that was ignored in this case.

Acting pursuant to its constitutional grant of authority,[19] the Legislature has created a detailed statutory scheme that includes: Chapter 40 (one-action rule), NRS 40.433 ("mortgage or other lien" includes a deed of trust), **App. 34**, Chapter 106 (Real Mortgages includes a deed of trust since 1965), NRS 106.240 (statute of repose), **App. 34**, and Chapter 107 (Deeds of Trust), NRS 107.080.3 (recognition of acceleration clauses as contract terms and provides a mechanism for the exercise of the option to accelerate). **App. 35.** In ignoring these related statutes, the Supreme Court failed to follow its own holding:

> " . . . it is the duty of this Court, when possible, to interpret provisions within a common statutory scheme "harmoniously with one another in accordance with the general purpose of those statutes" and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent." *Southern Nevada Homebuilders Association v. Clark County,* 121 Nev. 446, 117 P.3d 171 (2005).

The Supreme Court's decision to depart entirely from the legislative scheme, by ignoring it, and to focus exclusively on its "plain and unambiguous"

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[19] The Constitution of the State of Nevada, Article 3, Section 1; Article 4, Section 1.

reading of NRS 106.240, may serve some policy not evident in its unpublished Order, but it is the clearly expressed intent of the Legislature that the Statute of Repose and the exercise of an option to accelerate made in the manner prescribed by statute must be recognized and given legal effect.

Once the Legislature adopted a Statute of Repose and a mechanism for exercise of acceleration clauses in deeds of trust (as it has done in NRS 107.080.3) the right of Petitioners to rely on that mechanism is of constitutional stature. The general coherence of the legislative scheme may not be altered by judicial interpretation. *Bush v. Gore, supra.* When the very question at issue is whether the Supreme Court departed from the statutory scheme, it is the responsibility of This Court to enforce the requirements of the Due Process and Equal Protection clauses. *Bush v. Gore*, *supra*, Monaghan, pp. 1930-34. The reading (ignoring) of Nevada law is one no reasonable person would adopt. J. Harrison, *Federal Appellate Jurisdiction over Questions of State Law in State Courts*, 7 Green Bag 2d 354 (2004).

The options to accelerate were exercised.

The terms of both the Promissory Note and the Deed of Trust allow for acceleration. **App. 40-41, 52.** The option to exercise the acceleration clauses was affirmatively exercised by Notice of Default, 1989, **App. 55-56**, the manner prescribed by statute, **App. 35**, and it was recorded. The Supreme Court ignored

the acceleration terms and the affirmative exercise of the options to accelerate that were duly recorded and that revoked any maturity date, recorded or unrecorded (including the 1985 extension), and accelerated the wholly due date to 1989. The Debtors did not have until 1996 to pay off the Promissory Note; the entire debt was due in 1989. There was no rescission of this acceleration. There was a revocation of the extension. This new "wholly due date" appeared of record and meets the requirements for triggering the statute of repose. It is a "term thereof" that changes the wholly due date.

By ignoring the wholly due date in the Notice of Default as a trigger for the Statute of Repose, the Supreme Court failed to recognize that the lien was extinguished seven years before the revoked extension was recorded. In addition to questions raised earlier about the recordation of the unacknowledged copy of the extension, the failure of respondents to act with due diligence should have been recognized. The Legislature intended a 10 year statute of repose.[20]

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[20] The legislative history of NRS 106.240 (and the work of the National Conference of Commissioners on Uniform State Laws (NCCUSL), and the other authorities) is in the briefs on appeal. AOB, pp. 19-21; ARAB, 16-17. "Many states have similar statutes which extinguish the deed of trust lien absolutely on the passage of time. AOB, p. 20 citing: Basye, 2d Ed., *supra*, who is referring specifically to NRS 106.240. NRS 106.240 is not an aberration:

> "Statutes of Limitations that apply to real property rights express a policy that is essential to social progress by promoting the marketability of land title

(Continued on following page)

By using the due date in the extension as the trigger date, the Supreme Court has, in effect, created a 17 year statute of repose.

The Contract and Takings Clauses cases provide guidance.

The law of contracts, which includes the acceleration clauses expressly referred to in NRS 107.080.3, **App. 36**, creates the obligation that the Due Process and Equal Protection Clauses protect. This Court has long asserted authority under the Contract Clause to determine what antecedent state law interests are embraced by the Contract Clause:

> "It is well established doctrine that where the Contract Clause is invoked this Court must determine for itself the nature and effect of the alleged agreement and whether this has been impaired." *United States Mortgage Co. v. Mattewes*, 293 U.S. 232, 236 (1934); Monaghan, p. 1976.

By analogy (since legislation and not judicial conduct is restrained by the Contract Clause), it has the same

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after a certain amount of time of peaceful possession." N. Saint-Paul, Basye Clearing Land Titles, 3rd. Ed. 2009-2010, ¶4.1, *citing*: "They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary." *Wood v. Carpenter*, 101 U.S. 135 (1879).

authority as to the Due Process and Equal Protection clauses. The Takings Clause cases also provide guidance. *Stop the Beach*; *Lucas*; *Martin*; *Fairfax's Devisee, supra.* Monaghan, pp. 1940, 1976.

The individuals were deprived of their property by the Supreme Court in violation of the Due Process and Equal Protection Clauses of the United States Constitution, Amendment XIV, Section 1.

Mr. Gentile was not represented at the District Court hearing, after which the District Court decided that there was but a single issue in the Class and individual cases without consolidating the cases. The Supreme Court was silent about these Due Process Clause violations. It ignored issues raised in oral argument concerning the fact that the District Court had defined a single issue to the exclusion of all other issues in the cases without affected parties having notice and opportunity to appear. These due process violations were brought to the attention of the Supreme Court through briefing as well. Although the Supreme Court consolidated the cases, there was no opportunity for Mr. Gentile to provide new evidence. He was deprived of his right to present evidence of his substantial payments of principal, interest and taxes; and defenses which he has to the alleged lien on his parcel, including release clause issues, laches, and estoppel. Mr. Gentile has thus

been deprived of his property by violation of his rights under the Constitutional Command.

CONCLUSION

By ignoring the first two wholly due dates (accelerated and original) and accepting the extended date, the Supreme Court defeated the intent of the Legislature to extinguish liens of deeds of trust ten years after the wholly due date is reached and no action has been taken to protect the lien. The Supreme Court set a new standard completely at odds with Legislative intent. The new standard is applied only to Petitioners, by an unpublished Order having no precedential value. Acceleration clauses, in common use, are exercised to establish new, legally binding, dates when debts are wholly due. Hundreds of thousands of promissory notes, a vast number of which are federally insured, contain original wholly due dates that may trigger the Statute of Repose. Yet in Petitioners' case neither the original nor accelerated wholly due dates, properly established under the statutory scheme, was recognized as legally binding so as to trigger the Statute of Repose. Without opportunity to be heard in District Court, Mr. Gentile's individual case especially warrants issuance of the writ.

The Supreme Court has made an unforeseeable and unsupported decision on the Statute of Repose far beyond a fair reading of NRS 106.240 that does

not constitute an adequate ground to preclude This Court's review of the violations of the Constitutional Command. *Bouie v. City of Columbia*, 378 U.S. 347 (1964); Gressman, p. 143.

This Court is not being asked to second guess or publicly impugn the intellectual competence and good faith of The Supreme Court on a question of Nevada law. This Court is being asked to inquire into why The Supreme Court departed from well settled Nevada law in violation of the Constitutional Command, and to correct a wrong judgment, not to revise the unpublished Order. *Herb, supra*; Monaghan, pp. 1919, 1951, footnote 151. This inquiry is allowed by This Court's holding in *Bush v. Gore, supra.*

We respectfully request that this Petition for Writ of Certiorari be granted.

DATED this 15th day of July, 2010.

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IN THE SUPREME COURT
OF THE STATE OF NEVADA

MICHAEL PHILLIP GENTILE, SUING ON BEHALF OF HIMSELF AND ALL OTHER PURCHASERS OF LOTS 418S THROUGH 519S, PINION HILLS RANCHES, Appellant, vs. S. K. MADAN AND SHOBHANA MADAN, Respondents.	No. 49720 (Filed Dec. 16, 2009)
MICHAEL PHILLIP GENTILE, SUING ON BEHALF OF HIMSELF AND ALL OTHER PURCHASERS OF LOTS 418S THROUGH 519S, PINION HILLS RANCHES, Appellant, vs. S. K. MADAN, AN INDIVIDUAL; SHOBHANA MADAN, AN INDIVIDUAL; AND STOREY COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, Respondents.	No. 49747

MICHAEL PHILLIP GENTILE, Appellant, vs. S. K. MADAN AND SHOBHANA MADAN, Respondents.	No. 49749
STEWART H. PARKER, TRUSTEE OF THE STEWART H. PARKER AND MARGERY L. PARKER REVOCABLE TRUST DATED 5/15/92, Appellant, vs. S. K. MADAN AND SHOBHANA MADAN, Respondents.	No. 49753

ORDER OF AFFIRMANCE

These are consolidated appeals from final district court orders in real property actions. First Judicial District Court, Carson City; William A. Maddox, Judge.

These cases concern a deed of trust used to secure a promissory note for several parcels of land (the Storey County Property) in Storey County, Nevada. The primary question in these appeals concerns the interpretation of NRS 106.240. The statute extinguishes certain real property debts ten years after

they become wholly due, absent recorded extensions, and creates a conclusive presumption that the debt has been satisfied. The specific issue before us is what triggers the commencement of the ten-year time period set forth in NRS 106.240.

The parties have competing interests in the Storey County Property. Appellants (collectively, Gentile) are various property owners. When Gentile bought the land at issue, it was encumbered by a deed of trust. The recorded deed of trust did *not* contain a wholly due date in its terms. Respondents S.K. and Shobhana Madan became the last in a series of assignees of the beneficial interest of the deed of trust. Essentially, the underlying dispute involves the viability of the deed of trust and whether it has expired, as Gentile argues, or is valid and enforceable, as the Madans argue.

The district court determined that the deed of trust was valid and enforceable pursuant to the plain language of NRS 106.240. It made its decision based on the fact that the recorded deed of trust did not contain a wholly due date and therefore it did not trigger NRS 106.240. It further found that the written extension of the deed of trust, which did include a wholly due date, was valid and thereby rejected Gentile's notion that the extension had to be acknowledged or notarized. For the reasons set forth below, we agree and, therefore, affirm the judgment. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

DISCUSSION

Standard of review

We generally review a district court's order with respect to a declaratory judgment for an abuse of discretion. *County of Clark v. Upchurch*, 114 Nev. 749, 752, 961 P.2d 754, 756 (1998). However, "[q]uestions of law are reviewed de novo." *SIIS v. United Exposition Services Co.*, 109 Nev. 28, 30, 846 P.2d 294, 295 (1993).

NRS 106.240 was not triggered by the deed of trust

On appeal, Gentile argues that the deed of trust at issue was extinguished in March 1989 pursuant to NRS 106.240. We disagree because we conclude that NRS 106.240 was never triggered.

When a statute's language is plain and its meaning clear, this court will apply that plain language. *See MGM Mirage v. Nevada Ins. Guaranty Ass'n*, 125 Nev. ___, ___, 209 P.3d 706, 769 (2009). A statute is plain and unambiguous when it is capable of only one meaning. *Id.*

This case involves the interpretation of one statute – NRS 106.240. NRS 106.240 provides:

> The lien heretofore or hereafter created of any mortgage or deed of trust upon any real property, appearing of record, and not otherwise satisfied and discharged of record, shall at the expiration of 10 years after the debt secured by the mortgage or deed of trust

> according to the terms thereof or any recorded written extension thereof become wholly due, terminate, and it shall be conclusively presumed that the debt has been regularly satisfied and the lien discharged.

NRS 106.240 is unambiguous and therefore capable of only one meaning. *See Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 95, 16 P.3d 1074, 1077-78 (2001). It explicitly requires the deed of trust itself to contain "terms" that set out the date the recorded deed of trust would become wholly due and thereby trigger the commencement of the ten-year expiration provision of NRS 106.240.

In the present case, it is undisputed that the recorded deed of trust did not contain a wholly due date. By applying the plain terms of NRS 106.240 to this case, we conclude that the ancient mortgage statute was not triggered by the deed of trust because the document did not contain terms setting a wholly due date. There was, however, a written extension agreement which contained a wholly due date of August 30, 1996, which was recorded on August 28, 2006. Pursuant to the plain language of NRS 106.240, August 30, 1996 was the date the statute's expiration provision was triggered. Accordingly, we conclude the district court properly determined that the deed of trust was valid and enforceable because NRS 106.240 was not triggered by the deed of trust itself, but rather the written extension agreement.

NRS 106.240 does not require notarization of a recorded written extension

Gentile further argues that according to the "plain, clear, and unambiguous language" of NRS 106.240, a written agreement *and* recordation *and* some type of notarization are required for any extension of the wholly due date of a lien securing a deed of trust. Gentile contends that, in order to be recorded, the written extension must be acknowledged, for example, by a notary public. We disagree.

This court has had occasion to consider NRS 106.240 once before, when it was asked to determine whether the statute was limited to bona fide purchasers. *Pro-Max v. Feenstra*, 117 Nev. 90, 16 P.3d 1074 (2001). We rejected such an interpretation of the statute; stating that "[n]o limitation of the statute's terms to bona fide purchasers *can be read into the statute*." *Id.* at 95, 16 P.3d at 1078 (emphasis added). Our holding, then, as now, therefore rejected an interpretation that read language into the statute.

Gentile asks this court to do the very thing it rejected in *Pro-Max*, that is, to read terms into NRS 106.240. Gentile's interpretation of the statute would require the recorded written extension be notarized or authenticated, requirements that appear nowhere in the plain language of the statute. This type of reading of NRS 106.240 would read language into NRS 106.240 and therefore go against this court's jurisprudence of applying the *plain* language of a clear and unambiguous statute. Therefore, we conclude

that because NRS 106.240 does not contain any language requiring a notarization of a recorded written extension, the district court correctly determined that the extension agreement in this case was valid, despite not having been notarized.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

/s/ Hardesty, C.J.
Hardesty

/s/ Parraguirre, J.
Parraguirre

/s/ Douglas, J.
Douglas

/s/ Cherry, J.
Cherry

/s/ Saitta, J.
Saitta

/s/ Gibbons, J.
Gibbons

/s/ Pickering, J.
Pickering

cc: First Judicial District Court Dept. 2,
District Judge
Patrick O. King, Settlement Judge
Virgil A. Bucchianeri
Law Offices of Edward Bernard
Patrick James Martin
Maupin, Cox & LeGoy
Thorndal Armstrong Delk Balkenbush
& Eisinger/Reno Jones Vargas/Reno
Virgil A. Bucchianeri
Law Offices of Edward Bernard
Carson City Clerk
Storey County Clerk

Case No. CV19959
Dept. No. 2

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF STOREY

MICHAEL PHILLIP GENTILE, suing on behalf of himself and all other purchasers of Lots 418S through 519S, PINION HILLS RANCHES,

Plaintiff,

vs.

JOTI DEVELOPMENT CORPORATION, a Nevada Corporation; JOHN L. GEAN and, PAUL LAZARIS and CONSTANTINO ("TINO") LAZARIS its last Directors; JOHN L. GEAN, an individual; S.K. MADAN, an individual; SHOBANA MADAN, an individual; DON MADAN, an individual; PALM INVESTMENT GROUP LLC, a Nevada Limited Liability Company; STOREY COUNTY, a Political Subdivision of the State of Nevada; and JOHN DOES 1-10,

Defendants.

ORDER DECLARING LAKE TAHOE RECREATIONAL LAND COMPANY DEED OF TRUST VALID AND ENFORCEABLE

(Filed May 29, 2007)

THIS MATTER comes before the Court pursuant to an oral order given at the July 21, 2006 hearing to stay all proceedings in this matter. The issues in this case have been extensively briefed, and this Court deeming itself fully advised of the matter, hereby enters its Order as follows:

INTRODUCTION

After the July hearing, the Court took this case under advisement and identified the central issue to be resolved. The ultimate issue before the Court is whether the Lake Tahoe Recreational Land Co., Inc. ("LTRLCO") Deed of Trust securing the Promissory Note for the purchase of parcels 418S through 519S in Storey County, Nevada, is still valid or whether it has expired pursuant to N.R.S. 106.240. This Court rejects Plaintiff's interpretation of N.R.S. 106.240 and holds that the LTRLCO Deed of Trust was validly extended pursuant to an executed written agreement between the then interested parties on September 4, 1985, which modified the date the promissory note became wholly due to August 30, 1996.

FACTS AND PROCEDURAL HISTORY

It is a daunting task to summarize the facts and procedural history of a case that is so muddied with filings and so incomprehensible it is impossible to ascertain the relief that is requested. (*See* Plaintiff's "Reply To: The Madans Reply To 'Mr. Gentile's Supplemental No. 2 To Reply To: Second Supplemental

Opposition To Plaintiff's Supplemental Reply'"). This Court reminds counsel of F.J.D.C.R. 15 (2-4) which allows for a moving party to file any motion, the opposing party to file an opposition, and for the moving party to reply to the opposition. ***Id.*** While the Court does not require strict adherence to this rule, it is abundantly clear that the supplemental filings have confused the factual and legal issues in the present matter. Additionally, due to the unavoidable "lag-time" in the service of filings to the Court, it is understandable why counsel would provide courtesy copies of all filings. However, in the future, do not provide courtesy copies to the Court unless specifically requested to do so. Below is a truncated summary of the relevant facts and the one-hundred-fifty-six filings in this matter.

A. Michael Gentile's Interest

The Plaintiff, Michael Gentile, is a judgment creditor of JOTI Development Corporation ("JOTI") and John L. Gean, M.D., President of JOTI. Mr. Gentile, in case number 85-01166A, sued JOTI and Dr. Gean on his own behalf and on behalf of other purchasers of Lots 418S through 519S Pinion Hills Ranches in Storey County, Nevada ("Lots"). The Judgment was filed on December 3, 1990 and the Judgment has since been renewed as recently as August 17, 2005.

Mr. Gentile filed the Complaint in this case on September 9, 2005 requesting (1) Declaratory Relief;

(2) Appointment of Receivers; (3) Request for Court to Take Judicial Notice; (4) Quiet Title Claims for Relief; and (5) Notice of Pendency of Action. Compl. ¶1. After the July Hearing and much briefing, Mr. Gentile has narrowed his focus and argues that the Deed of Trust securing the Lots expired pursuant to N.R.S. 106.240 on the "critical date" of March 28, 1999. Ultimately, Mr. Gentile seeks the authority to collect on the final judgment from case 85-01166A.

B. S.K. and Shobhana Madan's Interest

In the present action, Mr. Gentile named Defendants S.K. Madan and Shobhana Madan as interested parties in the JOTI development judgment. The Madans are the successor-in-interest to the original lender/financier LTRLCO. The Madans acquired the beneficial interest in the LTRLCO Deed of Trust on October 24, 1994 pursuant to an "Assignment of Mortgage or Beneficial Interest in Deed of Trust," recorded on February 23, 2003.

The Madans acquired the Assignment for a price of $275,000.00 from America Devco, Inc., a California corporation, who was successor-in-interest of LTRLCO to the note secured by the deed of trust. The note executed by JOTI was dated March 28, 1979, had a face amount of $1,542,000.00, and was secured by trust deed recorded on April 2, 1979 as Document No. 44122, Book 15, Page 633 in the Office of the Recorder of Storey County, Nevada, and encumbered Lots 418S through 519S. Subsequent to filing the trust

deed, JOTI and America Devco executed a written modification of the note on September 4, 1985, titled "Agreement and Modification of Note Secured by Deed of Trust." The modified agreement changed the date the note would be "all due and payable" to August 30, 1996. A copy of this agreement extending the promissory note was filed and recorded in Storey County, Nevada on August 28, 2006.

The LTRLCO Deed of Trust is superior to all individual and separate, "All Inclusive Deed(s) of Trust" that JOTI executed to secure payment on individual lots sold to various purchasers. The several "All Inclusive Deed of Trust" deeds are expressly "subject and subordinate to" the LTRLCO Deed of Trust. (*See* Exhibit "6" to Plaintiff's Motion For Temporary Restraining Order at page 433-34 filed June 16, 2006). Therefore, the LTRLCO Deed of Trust controls. Additionally, the Madans have an interest in the Assignment because they have paid $152,716.04 in taxes to Storey County on various parcels for tax years 1998 and 2003. The Madans request that the Court find the LTRLCO Deed of Trust to be valid and unexpired and that the Temporary Restraining Order be dissolved.

DISCUSSION

The underlying issue in this case is whether the LTRLCO Deed of Trust is valid. In Nevada, a lien on real property that is secured by a deed of trust is presumptively extinguished ten years after the debt

becomes due. ***Pro-Max v. Feenstra***, 117 Nev. 90, 16 P.3d 1074 (2001). Examination of N.R.S. 106.240 will determine whether the LTRLCO Deed of Trust is extinguished, and provides as follows:

> The lien heretofore or hereafter created of any mortgage or deed of trust upon any real property, appearing of record, and not otherwise satisfied and discharged of record, shall at the expiration of 10 years after the debt secured by the mortgage or deed of trust according to the terms thereof or any recorded written extension thereof become wholly due, terminate, and it shall be conclusively presumed that the debt has been regularly satisfied and the lien discharged.

Each party interprets the statute differently and each interpretation results in a different outcome.

The Plaintiff argues that the statute requires a "recorded written extension" of any modification to a promissory note effecting interests in real property. Further, he reads the statute together with N.R.S. 111.240 and N.R.S. 111.310, which would require that the modified document, in order to be recorded, must be notarized. In this case, the Modification of Note Secured by Deed of Trust is not notarized, but was recorded by incorporation as an exhibit attached to the notice of extension on August 28, 2006.

Conversely, the Defendants submit two arguments. First, that the statute only requires an executed written extension establishing a new "wholly due" date. Second, that the "wholly due" date must be

expressly within the deed of trust itself in order for the expiration provision of the statute to apply.

The Court rejects the Plaintiff's interpretation of the statute and finds that the LTRLCO Deed of Trust is valid. Although a plain reading of the statute reveals that there is a conclusive presumption that a lien on real property created by a deed of trust will expire 10 years after the debt secured by the deed of trust becomes wholly due, it also provides that the due date of the debt may be extended by a recorded written extension. N.R.S. 106.240. While the statute is silent on whether the written extension must be notarized in order to be effective, the Court finds no authority requiring such action in order to be effective. In the instant case, a written extension of the promissory note was executed by the then interested parties on September 4, 1985, which extended the wholly due date for the note to August 30, 1996. The extension was recorded by the successor-in-interest on August 28, 2006, thus, the due date was properly extended pursuant to the executed written agreement.

The Plaintiff argues that the holding in the case *Pro-Max v. Feenstra*, in which the Supreme Court interpreted N.R.S. 106.240 and found that a deed of trust had expired, should be followed in this matter. However, in that case, Pro-Max Corporation executed promissory notes to its shareholders that were secured by deeds of trust on Pro-Max's interest in real property. ***Pro-Max v. Feenstra***, 117 Nev. 90 (2001). Included in that deed of trust was a provision

concerning the due date of the debt which the deed secured. ***Id.*** The statute expressly provides that a lien will expire 10 years after "the debt secured by the mortgage or deed of trust *according to the terms thereof* . . . become wholly due" **N.R.S. 106.240** (emphasis added).

In the present matter, the LTRLCO Deed of Trust does not include language setting out a date that the debt will become wholly due. In fact, the LTRLCO Deed of Trust by its own terms allows extensions of the promissory note:

> "For the Purpose of Securing: 2. Payment of the indebtedness evidenced by one promissory note of even date herewith, and any extension or renewal thereof, in the principal sum of $1,542,000.00 executed by Trustor in favor of Beneficiary."

Additionally, *Pro-Max* is distinguished because in that case it was "undisputed that no written agreements to extend the notes and deeds of trust were ever executed or recorded." ***Pro-Max*** at 94. In this case, it is undisputed that there was a written agreement executed to extend the note and it was recently recorded. Therefore, good cause appearing;

IT IS HEREBY ORDERED that the LTRLCO Deed of Trust is valid and enforceable and the Temporary Restraining Order prohibiting the Trustee sale is dissolved.

DATED this 24th day of May, 2007.

/s/ William A. Maddox
WILLIAM A. MADDOX
District Judge

Case No. CV19947
Dept. No. 2

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF STOREY

MICHAEL PHILLIP GENTILE, Plaintiff, vs. JOTI DEVELOPMENT CORPORATION, et al., Defendants.	**ORDER RE: CV 19959** (Filed May 29, 2007)

This case is directly related to Case No. CV 19959. This Court entered an Order on May 24, 2007 in CV 19959 which will resolve the pending matters in this case. Good cause appear therefore,

IT IS HEREBY ORDERED that the parties review and conform with the Order filed in Storey County Case No. CV 19959.

DATED this 24th day of May, 2007.

/s/ William A. Maddox
William A. Maddox
District Judge

Case No. 85-01166A
Dept. No. 2

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

MICHAEL PHILLIP GENTILE, Suing on Behalf of Himself and all other Purchasers of Lots 418S through 519S, PINION HILLS RANCHES, Plaintiff, vs. JOTI DEVELOPMENT CORPORATION, a Nevada corporation, *et al.*, Defendants.	**ORDER** (Filed May 24, 2007)

This matter comes before the court pursuant to Plaintiff's Motion Re: 1. Proceedings Supplementary to Execution, NRS 21.270-NRS 21.340; and 2. For Temporary Restraining Order and Preliminary Injunction, NRCP 65; NRS 33.010 filed on August 1, 2006. S.K. Madan and Shobhana Madan filed a Special Appearance to Oppose Motion Re: 1. Proceedings Supplementary to Execution and 2. For Temporary Restraining Order and Preliminary Injunction on August 18, 2006. Plaintiff filed a Reply to Opposition to Motion Re: Proceedings Supplementary to Execution and 2. For Temporary Restraining Order and

Preliminary Injunction and submitted the matter on August 24, 2006. The Court deeming itself fully advised of the matter, hereby enters its Judgment as follows:

This case is directly related to Case No. CV 19959. This Court entered an Order on May 24, 2007 in CV 19959 which will resolve the pending matters in this case. Good cause appearing therefore,

IT IS HEREBY ORDERED that the parties review and conform with the Order filed in Storey County Case No. CV 19959.

DATED this 24th day of May, 2007

/s/ William A. Maddox
William A. Maddox
District Judge

Case No. CV19959
Dept. No. 2

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF STOREY

MICHAEL PHILLIP GENTILE, suing on behalf of himself and all other purchasers of Lots 418S through 519S, PINION HILLS RANCHES,

Plaintiff,

vs.

JOTI DEVELOPMENT CORPORATION, A Nevada Corporation; JOHN L. GEAN and, PAUL LAZARIS and CONSTANTINO ("TINO") LAZARIS its last Directors; JOHN L. GEAN an individual; S.K. MADAN, an individual; SOBANA MADAN, an individual; DON MADAN, an individual; PALM INVESTMENT GROUP LLC, a Nevada Limited Liability Company; STOREY COUNTY, a Political Subdivision of the State of Nevada; and JOHN DOES 1-10,

Defendants.

_____/

ORDER REQUIRING HEARING ON PENDING MOTIONS

(Filed Jun. 15, 2006)

THIS MATTER comes before the Court pursuant to Plaintiff's Motions: 1) To Alter or Amend Order Denying Motion to Dismiss – NRCP 59(e); 2) For Reconsideration of Order Denying Motion to Dismiss; 3) For (Pretrial) Summary Judgment; 4) To Appoint a Receiver for Joti Development Corporation, A Defunct Nevada Corporation, To Take Charge of the Schedule 4 Joti Parcels; 5) To Appoint the Public Administrator of Storey County or Michael Phillip Gentile, as Representative Plaintiff, as Administrator of the Estate of John L. Gean to Take Charge of the Schedule 5 Gean Parcels; and 6) Request for Oral Argument filed with the Court on May 9, 2006. Defendants filed an Opposition to Plaintiff's Motions on May 26, 2006. The Plaintiff filed a Reply with the Court on June 1, 2006. The Plaintiff also filed a Request for Submission on June 1, 2006. This Court has read the case file as well as the law applicable to the issues raised. This Court deeming itself fully advised of the matter, hereby enters its Order as follows:

Due to the Plaintiff's admittedly unskillful drafting of the Complaint and subsequent Motions, the Court still cannot determine what the Plaintiff is attempting to request. As a result, the Court hereby Orders the parties to set a hearing before the Court in an attempt to clarify Plaintiff's motions with the assumption that he will present his arguments with more clarity in person than he has presented thus far on paper. Therefore, good cause appearing;

IT IS HEREBY ORDERED that counsel for the parties shall, within 30 days of the date of this Order,

jointly contact this Court's Judicial Assistant at 882-1619 to set a hearing on the pending motions.

DATED this 9th day of June, 2006.

/s/ William A. Maddox
William A. Maddox
DISTRICT JUDGE

cc: Patrick James Martin, Esq.
Michael A. Nivinskus, Esq.
Brent T. Kolvet, Esq.

Case No. CV19959
Dept. No. 2

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF STOREY

– o O o –

MICHAEL PHILLIP GENTILE, Suing on Behalf of Himself and all other Purchasers of Lots 418S through 519S, PINION HILLS RANCHES,

Plaintiff,

vs.

JOTI DEVELOPMENT CORPORATION, a Nevada Corporation; JOHN L. GEAN and PAUL LAZARIS and CONSTANTINO ("TINO") LAZARIS its last directors; JOHN L. GEAN, an individual; S.K. MADAN, an individual; DON MADAN, an individual' PALM INVESTMENT GROUP LLC, a Nevada Limited Liability Company; STOREY COUNTY, A Political Subdivision of the State of Nevada; and JOHN DOES 1-10,

Defendants.

_____/

ORDER DENYING MOTION TO DISMISS

(Filed Apr. 27, 2006)

THIS MATTER comes before the Court pursuant to Defendants' Motion to Dismiss Purported Class Action filed with the Court on December 23, 2005. Defendant Storey County filed a Joinder in Motion to Dismiss Purported Class Action with the Court on January 17, 2006. The Plaintiffs filed an opposition titled, 'Plaintiff, Mr. Gentile for the Class Opposition To: Motion to Dismiss Purported Class Action FJDCR 15.3' with the Court on January 17, 2006. The Defendants filed Defendants' Reply in Support of Motion to Dismiss Purported Class Action with the Court on February 24, 2006. This matter was submitted for the Court's decision on February 24, 2006 as well. This Court has read the case file as well as the law applicable to the issues raised. Deeming itself fully advised of the matter, the Court hereby enters its Findings of Fact, Conclusions of Law, Discussion, and Judgment as follows:

FINDINGS OF FACT

The Plaintiffs had a case, designated as case number 85-01166A, before the First Judicial District Court in Storey County that was initiated in 1985. In 1987, the Court certified plaintiffs' class. Plaintiff Gentile is now before the Court as a representative of this class in order to enforce and/or seek relief that Plaintiff believes the class is entitled to receive. In Plaintiffs' present suit, Plaintiff Gentile has alleged that within this class, there are seven subclasses of plaintiffs that should be recognized and awarded relief specific as to that subclass. The certified class

did not contain, mention, or recognize any subclasses as asserted in the present complaint before the Court.

Plaintiffs have asserted that they are not pursuing the present case as a class, but rather an action on a Judgment. The Defendants assert that this is a new case that is different than the certified class case from twenty years ago. These differences, Defendants assert, are sufficient to constitute an entirely new case which would require the Plaintiffs to get their purported class certified by following the procedural requirements of NRCP 23.

CONCLUSIONS OF LAW

An action on a Judgment can be accomplished in a number of ways. The Nevada Supreme Court, through persuasive case law, recognized that a "judgment creditor may enforce his judgment by the process of the court in which he obtained it, or he may elect to use the judgment as an original cause of action and bring suit thereon and prosecute such suit to final judgment." ***Mandlebaum v. Gregovich***, 24 Nev. 154, 161, 50 P. 849, 851 (1897). *citing* ***Palmer v. Glover***, 73 Ind. 529 (1881).

A class action lawsuit must conform with the Nevada Rules of Civil Procedure. Rule 23 states:

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2)

there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

DISCUSSION

Plaintiffs assert that the complaint filed "very clearly is an action on a Judgment." Pl.'s Opp. to Mot. to Dismiss ¶7. The case law cited by the Plaintiffs does not speak to the number of people involved, but the case did address the possible avenues a judgment creditor may take to enforce a judgment. That court stated, with a reference to persuasive case law out of Indiana, that the judgment creditor may enforce his judgment by the process of the court in which he obtained it, or in the alternative, the judgment creditor may elect to use the judgment as an original cause of action and bring suit thereon and prosecute this new suit to a final judgment.

Plaintiff has chosen to pursue a new case instead of enforcing the judgment obtained in case number 85-01166A, as evidenced by filing the new complaint in a new forum (Storey County instead of Carson City). Therefore, the Plaintiffs have initiated a new suit.

As to the number of Plaintiffs, the Defendants' argument is more compelling. Plaintiffs rely primarily on *Mandlebaum* and the phrases "very plainly" and "very clearly" to suggest that there is only one plaintiff. However, there cannot be only one plaintiff if there are seven subsets of plaintiffs within this purported one plaintiff. Furthermore, *Mandlebaum* only speaks to creditor judgments, and not class actions involving a judgment. Plaintiff has cited no other case or statute that grants authority to this

Court to take the position Plaintiff asserts, which is that a former class can institute a new case based upon a judgment of a previous case, subdivide the former class into seven subclasses not previously addressed, and pursue the new cause of action as a class but have only the representative of the class be a party to a new cause of action in order to act as the judgment creditor for the entire former class without following the procedures for filing as a class.

Without supporting authority or argument for these assertions, Plaintiffs' Opposition must fail. Furthermore, Defendants contend that the Plaintiffs should not be able to amend the complaint to allege a class action suit even though the Plaintiff has expressed a desire and has pursued a plan of action not to amend the complaint. However, in order to give Plaintiffs their day in court, the Court will allow the complaint to be amended in hopes that the Plaintiff will attempt to resolve the multiple problems presented by the course of action this Plaintiff has taken.

At the end of the day, it is nearly impossible to determine what the Plaintiff or Plaintiffs want because they are proceeding upon a certified class action suit that resulted in a judgment. Instead of enforcing that judgment, Plaintiff Gentile has opted to file a new complaint, and subdivide the original certified class that was limited to Case No. 85-01166A into seven subclasses, and assert that it is no longer a class action suit, but rather one single Plaintiff representative who now wants to enforce and recover

on the original judgment without any other of the original plaintiffs being part of the suit. If this is the case, then it should be dismissed, as there are parties missing who need to be named and the one single Plaintiff would recover an unjust financial windfall. With this said, the Plaintiffs may amend the complaint to pursue a single claim personal to Mr. Gentile or to allege a class action pursuant to the proper procedures of NRCP 23. If the complaint is not amended to adhere to this Order, the Defendants will have sufficient law and facts to dismiss the case. Therefore, good cause appearing;

JUDGMENT

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss Purported Class Action is DENIED at this time.

IT IS FURTHER ORDERED that Plaintiff(s) may amend the complaint to allege a single cause of action or to address what authority they have to pursue this case as a single plaintiff seeking to recover an entire class judgment or, in the alternative, to allege that the plaintiffs qualify as a class to be verified by the court.

DATED this 25th day of April, 2006.

/s/ William A. Maddox
William A. Maddox
DISTRICT JUDGE

IN THE SUPREME COURT
OF THE STATE OF NEVADA

MICHAEL PHILLIP GENTILE, SUING ON BEHALF OF HIMSELF AND ALL OTHER PURCHASERS OF LOTS 418S THROUGH 519S, PINION HILLS RANCHES, Appellant, vs. S. K. MADAN AND SHOBHANA MADAN, Respondents.	No. 49720
MICHAEL PHILLIP GENTILE, SUING ON BEHALF OF HIMSELF AND ALL OTHER PURCHASERS OF LOTS 418S THROUGH 519S, PINION HILLS RANCHES, Appellant, vs. S. K. MADAN, AN INDIVIDUAL; SHOBHANA MADAN, AN INDIVIDUAL; AND STOREY COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, Respondents.	No. 49747

MICHAEL PHILLIP GENTILE, Appellant, vs. S. K. MADAN AND SHOBHANA MADAN, Respondents.	No. 49749
STEWART H. PARKER, TRUSTEE OF THE STEWART H. PARKER AND MARGERY L. PARKER REVOCABLE TRUST DATED 5/15/92, Appellant, vs. S. K. MADAN AND SHOBHANA MADAN, Respondents.	No. 49753 (Filed Feb. 16, 2010)

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ Parraguirre, C.J.
Parraguirre

/s/ Hardesty, J.
Hardesty

/s/ Douglas, J.
Douglas

/s/ Cherry, J.
Cherry

/s/ Saitta, J.
Saitta

/s/ Gibbons, J.
Gibbons

/s/ Pickering, J.
Pickering

cc: First Judicial District Court Dept. 2,
District Judge
Virgil A. Bucchianeri
Law Offices of Edward Bernard
Patrick James Martin
Maupin, Cox & LeGoy
Thorndal Armstrong Delk Balkenbush
& Eisinger/Reno
Jones Vargas/Reno
Virgil A. Bucchianeri
Law Offices of Edward Bernard
Thorndal Armstrong Delk Balkenbush
& Eisinger/Reno
Carson City Clerk
Storey County Clerk

NRS: CHAPTER 40 – ACTIONS AND PROCEEDINGS IN PARTICULAR CASES CO . . .

NRS 40.433 "Mortgage or other lien" defined. As used in NRS 40.430 to 40.459, inclusive, unless the context otherwise requires, a "mortgage or other lien" includes a deed of trust, but does not include a lien which arises pursuant to chapter 108 of NRS, pursuant to an assessment under chapter 116, 117, 119A or 278A of NRS or pursuant to a judgment or decree of any court of competent jurisdiction.

(Added to NRS by 1989, 1767; A 1991, 580)

NRS: CHAPTER 106 – REAL MORTGAGES

NRS 106.240 Extinguishment of lien created by mortgage or deed of trust upon real property. The lien heretofore or hereafter created of any mortgage or deed of trust upon any real property, appearing of record, and not otherwise satisfied and discharged of record, shall at the expiration of 10 years after the debt secured by the mortgage or deed of trust according to the terms thereof or any recorded written extension thereof become wholly due, terminate, and it shall be conclusively presumed that the debt has been regularly satisfied and the lien discharged.

[2:37:1917; 1919 RL p. 3352; NCL § 9410] – (NRS A 1965, 1229)

NRS: CHAPTER 107 – DEEDS OF TRUST

DEFAULT AND SALE

NRS 107.080 Trustee's power of sale: Power conferred; required notices; effect of sale; circumstances in which sale may be declared void.

1. Except as otherwise provided in NRS 107.085, if any transfer in trust of any estate in real property is made after March 29, 1927, to secure the performance of an obligation or the payment of any debt, a power of sale is hereby conferred upon the trustee to be exercised after a breach of the obligation for which the transfer is security.

2. The power of sale must not be exercised, however, until:

(a) In the case of any trust agreement coming into force:

(1) On or after July 1, 1949, and before July 1, 1957, the grantor, or his successor in interest, a beneficiary under a subordinate deed of trust or any other person who has a subordinate lien or encumbrance of record on the property, has for a period of 15 days, computed as prescribed in subsection 3, failed to make good the deficiency in performance or payment; or

(2) On or after July 1, 1957, the grantor, or his successor in interest, a beneficiary under a subordinate deed of trust or any other person who has a subordinate lien or encumbrance of record on

the property, has for a period of 35 days, computed as prescribed in subsection 3, failed to make good the deficiency in performance or payment;

(b) The beneficiary, the successor in interest of the beneficiary or the trustee first executes and causes to be recorded in the office of the recorder of the county wherein the trust property, or some part thereof, is situated a notice of the breach and of his election to sell or cause to be sold the property to satisfy the obligation; and

(c) Not less than 3 months have elapsed after the recording of the notice.

3. The 15- or 35-day period provided in paragraph (a) of subsection 2 commences on the first day following the day upon which the notice of default and election to sell is recorded in the office of the county recorder of the county in which the property is located and a copy of the notice of default and election to sell is mailed by registered or certified mail, return receipt requested and with postage prepaid to the grantor, and to the person who holds the title of record on the date the notice of default and election to sell is recorded, at their respective addresses, if known, otherwise to the address of the trust property. The notice of default and election to sell must describe the deficiency in performance or payment and may contain a notice of intent to declare the entire unpaid balance due if acceleration is permitted by the obligation secured by the deed of trust, but acceleration must not occur if the deficiency in

performance or payment is made good and any costs, fees and expenses incident to the preparation or recordation of the notice and incident to the making good of the deficiency in performance or payment are paid within the time specified in subsection 2.

4. The trustee, or other person authorized to make the sale under the terms of the trust deed or transfer in trust, shall, after expiration of the 3-month period following the recording of the notice of breach and election to sell, and before the making of the sale, give notice of the time and place thereof by recording the notice of sale and by:

(a) Providing the notice to each trustor and any other person entitled to notice pursuant to this section by personal service or by mailing the notice by registered or certified mail to the last known address of the trustor and any other person entitled to such notice pursuant to this section;

(b) Posting a similar notice particularly describing the property, for 20 days successively, in three public places of the township or city where the property is situated and where the property is to be sold; and

(c) Publishing a copy of the notice three times, once each week for 3 consecutive weeks, in a newspaper of general circulation in the county where the property is situated.

5. Every sale made under the provisions of this section and other sections of this chapter vests in the

purchaser the title of the grantor and his successors in interest without equity or right of redemption. A sale made pursuant to this section may be declared void by any court of competent jurisdiction in the county where the sale took place if:

(a) The trustee or other person authorized to make the sale does not substantially comply with the provisions of this section;

(b) Except as otherwise provided in subsection 6, an action is commenced in the county where the sale took place within 90 days after the date of the sale; and

(c) A notice of lis pendens providing notice of the pendency of the action is recorded in the office of the county recorder of the county where the sale took place within 30 days after commencement of the action.

6. If proper notice is not provided pursuant to subsection 3 or paragraph (a) of subsection 4 to the grantor, to the person who holds the title of record on the date the notice of default and election to sell is recorded, to each trustor or to any other person entitled to such notice, the person who did not receive such proper notice may commence an action pursuant to subsection 5 within 120 days after the date on which the person received actual notice of the sale.

7. The sale of a lease of a dwelling unit of a co-operative housing corporation vests in the purchaser

title to the shares in the corporation which accompany the lease.

[Part 1:173:1927; A 1949, 70; 1943 NCL § 7710] – (NRS A 1957, 631; 1959, 10; 1961, 23; 1965, 611, 1242; 1967, 198; 1979, 708; 1987, 1644; 1989, 1770; 2003, 2893; 2005, 1623; 2007, 2447)

Do Not Destroy This Original Note: When paid, said Original Note, together with the Deed of Trust securing some, must be surrendered to Trustee for Cancellation and retention before reconveyance will be made.

NOTE SECURED BY DEED OF TRUST

(INSTALLMENT-INTEREST INCLUDED)

$1,542,000.00 Los Angeles, California, March 28, 1979

In installments as herein stated, for value received, I promise to pay to LAKE TAHOE RECREATIONAL LAND COMPANY, INC., a Nevada Corporation _____ or order, at Los Angeles, California _____ the sum of One Million Five Hundred Forty-Two Thousand and no/100———————— DOLLARS, with interest from April 2, 1979 on unpaid principal at the rate of nine (9%) per cent per annum; principal and interest payable in installments of Forty-seven Thousand Ninety-Two and 68/100 ($48,092.68)——— Dollars of more on the last day of each third month, beginning on the last day of August, 1979 and continuing quarterly thereafter through May 30, 1991; the entire unpaid principal balance and accrued interest shall be due and payable August 30, 1991.

_____ xxxxxxxxxxxxxxxxxxxxxxxx

Each payment shall be credited first on interest then due and the remainder on principal; and interest shall thereupon cease upon the principal so credited. Should default be made in payment of any installment when due the whole sum of principal and

interest shall become immediately due at the option of the holder of this note. Principal and interest payable in lawful money of the United States. If action be instituted on this note I promise to pay such sum as the Court may fix as attorney's fees. This note is secured by a DEED OF TRUST ~~to TITLE INSURANCE AND TRUST COMPANY, a California corporation, as trustee~~.

JOTI DEVELOPMENT CORPORATION
a Nevada corporation

BY: John L. Gean
John L. Gean,
President

TO 417.1 CA (11-48)

THIS FORM FURNISHED BY
TITLE INSURANCE AND TRUST COMPANY
DO NOT DESTROY THIS NOTE
[orig. to Chris Krogh 4/2/79]

STOREY COUNTY

28500 LB SHORT FORM
DEED OF TRUST AND ASSIGNMENT OF RENTS

This Deed of Trust, made this 28th day of March, 1979, between JOTI DEVELOPMENT CORPORATION, a Nevada corporation, herein called TRUSTOR, whose address is 931 North Western Avenue,
(number and street)
Los Angeles, California 90029
(city) (zone) (state)

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
LAWYERS TITLE INSURANCE CORPORATION, a Nevada corporation, herein called TRUSTEE, and LAKE TAHOE RECREATIONAL LAND COMPANY, INC., a Nevada corporation , herein called BENEFICIARY.

Witnesseth: That Trustor IRREVOCABLY GRANTS, TRANSFERS AND ASSIGNS TO TRUSTEE IN TRUST, WITH POWER OF SALE, that property in County, Nevada, described as

> Legal description is attached hereto as Exhibit "A" and incorporated herein by reference.

TOGETHER WITH the rents, issues and profits thereof, reserving the right to collect and use the same except during continuance of some default hereunder and during continuance of such default authorizing Beneficiary to collect and enforce the same by any lawful means in the name of any party hereto.

For the Purpose of Securing: 1. Performance of each agreement of Trustor incorporated by reference or

contained herein. 2. Payment of the indebtedness evidenced by one promissory note of even date herewith, and any extension or renewal thereof, in the principal sum of $1,542,000.00 executed by Trustor in favor of Beneficiary or order. 3. Payment of such additional sums as may hereafter be advanced for the account of Trustor or Assigns by Beneficiary with interest thereon. 4. Performance of each covenant, agreement, representation, and undertaking of Trustor, including without limitation the payment of all monies required to be paid by Trustor to Beneficiary thereunder under that certain agreement dated April 2, 1979 between Trustor and Beneficiary for the purchase and sale of the land encumbered hereby. This Deed of Trust is further subject to all of the provisions contained in Exhibit "B" attached hereto and incorporated herein by reference.

To Protect the Security of This Deed of Trust, Trustor Agrees: By the execution and delivery of this Deed of Trust and the note secured hereby, that provisions (1) to (16) inclusive of the Deed of Trust recorded in the book and at the page, or document No. of Official Records in the Office of the county recorder of the county where said property is located, noted below opposite the name of such county, viz:

COUNTY	DOCUMENT NO.	BOOK	PAGE
Clark	413987	514	
Churchill	104132	34 mrgs.	591
Douglas	24495	22	415
Elko	14831	42	343

Esmeralda	26291	314 deeds	138-141
Eureka	39602	3	283
Humboldt	116986	3	33
Lander	41172	3	758
Lincoln	41292	0 mtgs.	467
Washoe	407205	734	221
Lyon	88486	31 mtgs.	449
Mineral	76648	16 mtgs.	534-537
Nye	47157	67	163
Ormsby	72637	19	102
Pershing	57488	28	58
Storey	28573	R mtgs.	112
White Pine	128126	261	341-344

(which provisions identical in all counties, are printed on the reverse hereof) hereby are adopted and incorporated herein and made a part hereof as fully as though set forth herein at length; that he will observe and perform said provisions; and that the references to property, obligations, and parties in said provisions shall be construed to refer to the property, obligations, and parties set forth in this Deed of Trust.

The parties agree that with respect to provision 16, the amount of fire insurance required by covenant 2 shall be $_____ and with respect to attorneys' fees provided for by covenant 7 the percentage shall be _____%.

The undersigned Trustor requests that a copy of any Notice of Default and of any Notice of Sale hereunder be mailed to him at his address hereinbefore set forth.

STATE OF NEVADA,
COUNTY OF _____ | SS.

On _____ personally appeared before me, a Notary Public,

_____

_____

who acknowledged that he executed the above agreement.

TO: 449 C
(Corporation)

JOTI DEVELOPMENT CORPORATION
a Nevada corporation

BY: /s/ John L. Gean
John L. Gean, President

BY: /s/ Carol Ann Shaw
_____ Secretary

→ *If executed by a corporation the Corporation Form of Acknowledgement must be used.*

STATE OF CALIFORNIA,
COUNTY OF Los Angeles: | SS.

On March 28th, 1979 before me, the undersigned, a Notary Public in and for said State, personally appeared John L. Gean, president known to me to be the _____ President, and Carol Ann Shaw known to me to be _____ Secretary of the corporation that executed the within Instrument, known to me to be the persons who executed the within Instrument on behalf of the corporation

therein named, and acknowledged to me that such corporation executed the within Instrument pursuant to its by-laws or a resolution of its board of directors.

WITNESS my hand and official seal.

Signature Charles W. Russello

Charles W. Russello
Name (Typed or Printed)

[Seal]

OFFICIAL SEAL
CHARLES W. RUSSELLO
NOTARY PUBLIC – CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires
March 25, 1980

(This area for official notarial seal)

Attn: Jared R. B. Hutton, Esq.

EXHIBIT "A"

All that certain real property situated in Storey County, Nevada, more particularly described as:

Parcels 418-S through 519-S, inclusive, as shown on that certain Division of Land Map recorded February 1, 1979, as File No. 43664, in the Official Records of Storey County, Nevada.

EXHIBIT "B"
TO DEED OF TRUST

The note secured by this deed of trust includes within said sum obligations to the beneficiaries of prior encumbrances of record pertaining to all or some portion of the property described herein. Beneficiary hereby agrees with Trustor to discharge said included obligations or to cause said included obligations to be discharged in accordance with their terms and to hold Trustor harmless from any liability resulting from the failure of beneficiary to so discharge said obligations or to cause said obligations to be discharged.

In the event any of the obligations secured by said prior deeds of trust shall be in default, Trustor under this deed of trust may make payments thereon at Trustor's option and credit such payments to the obligations herein secured. Any demand for sale delivered to the Trustee for foreclosure of this deed of trust shall be reduced by such unpaid balances (if any) of principal, interest, and charges existing upon the obligations secured by the senior encumbrances referred to above as exist at the time of the Trustee's sale upon such foreclosure, satisfactory evidence of which unpaid balances must be submitted prior to said sale.

RELEASE PROVISIONS:

1. From time to time at the request of Trustor, Beneficiary shall instruct the Trustee under the Deed

of Trust to release any parcel of the property described in this Deed of Trust from the lien and priority of this Deed of Trust, provided the Beneficiary has theretofore received from the Trustor the sum set forth opposite the description of such parcel on "Exhibit 1", which is hereby incorporated herein by reference. All release payments shall apply against the obligatory payments of principal and interest next due, and all principal payments under the terms of said Note shall be credited on amounts paid for partial reconveyances hereunder.

2. There shall be no release for parcels or less that forty (40) acres. Trustor shall furnish a legal description of the property to be released. All released parcels shall conform to the government surveys, e.g. NW ¼ of NW ¼ of Section 1, and shall further conform to the Division of Land Map recorded February 1, 1979 as File No. 43664, Storey County Records.

EXHIBIT "1"

"S" Parcel no.	PRICE PER ACRE	"S" Parcel no.	PRICE PER ACRE	"S" Parcel no.	PRICE PER ACRE
479	$600	432	$500	512	$550
478	600	431	500	513	550
477	600	430	500	514	550
476	600	429	500	515	550
475	550	428	500	516	550
474	550	427	500	517	550
473	550	426	550	518	550

472	550	425	550	519	550
471	600	424	550		
470	600	423	500		
469	600	422	500		
468	600	421	500		
467	550	420	550		
466	550	419	550		
465	500	418	550		
464	500	480	600		
463	600	481	600		
462	600	482	600		
461	600	483	600		
460	600	484	550		
459	500	485	550		
458	500	486	550		
457	500	487	550		
456	500	488	550		
455	500	489	550		
454	600	490	550		
453	550	491	550		
452	500	492	550		
451	500	493	550		
450	550	494	550		
449	500	495	550		
448	500	496	550		
447	500	497	550		
446	500	498	550		
445	500	499	550		
444	500	500	550		
443	500	501	550		
442	500	502	500		
441	500	503	500		
440	500	504	500		
439	500	505	500		
438	500	506	500		

437	500	507	500
436	500	508	550
435	500	509	550
434	500	510	550
433	500	511	550

Filed for Record at Request of Lawyers Title Ins. Corp.
April 2, 1979 at 41 Min's. Past 4 o'clock P.M. Recorded in Book 15 of Official Records Page 633-634-635-636 Storey County, Nevada Mary Jane Rule Storey County Recorder By Billie Cole Deputy File No. 44122 Fee 6.00 pd.

No. 28573

DS-2263-C
STOREY CO.

DEED OF TRUST AND ASSIGNMENT OF RENTS
(Note not set out)

THIS DEED OF TRUST, made this 25 day of February, 1964, between EDNA J. JAMES, herein called GRANTOR or TRUSTOR, whose mailing address is Virginia City, Nevada,

PIONEER TITLE INSURANCE COMPANY OF NEVADA, a Nevada corporation, herein called Trustee, and

PIONEER TITLE INSURANCE COMPANY, herein called BENEFICIARY,

WITNESSETH: THAT WHEREAS Trustor has borrowed and received from Beneficiary in lawful

money of the United States the sum of One Hundred Dollars and 00/100 (100.00)—————, DOLLARS and has agreed to repay the same, with interest, to Beneficiary in lawful money of the United States according to the terms of a promissory note of even date herewith, executed and delivered therefor by Trustor;

NOW, THEREFORE, for the purpose of securing each agreement of the Trustor herein contained including payment of the said promissory note and of any money with interest thereon that may be advanced by or otherwise become due to Trustee or Beneficiary under the provisions hereof and for the purpose of securing payment of such additional sums as may hereafter be advanced for the account of Trustor by Beneficiary with interest thereon, Trustor irrevocably GRANTS AND TRANSFERS TO TURSTEE [sic], in TRUST, WITH POWER OF SALE, all that

* * *

Trustee shall be named as defendant, unless brough_ [sic] by Trustee.

VII. Acceptance by Beneficiary of any sum in payment of any indebtedness secured hereby, after the date when the same is due, shall not constitute a waiver of the right either to require prompt payment, when due, of all other sums so secured or to declare default as herein provided for failure so to pay.

VIII. Trustee may, at any time, or from time to time, without liability therefor and without notice,

upon written request of Beneficiary and presentation of this Deed of Trust and the notes secured hereby for endorsement, and without affecting the personal liability of any person for payment of the indebtedness secured hereby or the effect of this Deed of Trust upon the remainder of said property; reconvey any part of said property; consent in writing to the making of any map or plat thereof; join in granting any easement thereon; or join in any extension agreement or subordination agreement in connection herewith.

IX. Upon receipt of written request from Beneficiary reciting that all sums secured hereby have been paid and upon surrender of this Deed and said note to Trustee for cancellation and retention and upon payment of its fees, the Trustee shall reconvey without warranty the property then held hereunder. The recitals in such reconveyance of any matters of fact shall be conclusive proof of the truth thereof. The Grantee in such reconveyance may be described in general terms as "the person or persons legally entitled thereto," and Trustee is authorized to retain this Deed of Trust and note.

X. (a) Should default be made by Grantor in payment of any indebtedness secured hereby and/or in performance of any agreement herein, then Beneficiary may declare all sums secured hereby immediately due by delivery to Trustee of a written declaration of default and demand for sale, and of written notice of default and election to cause said property to be sold (which notice Trustee shall cause to be filed for record) and shall surrender to Trustee

this Deed, the notes and all documents evidencing any expenditure secured hereby.

(b) After three months shall have elapsed following recordation of any such notice of default, Trustee shall sell said property at such time and at such place in the State of Nevada as the Trustee, in its sole discretion, shall deem best to accomplish the objects of these Trusts, having first given notice of such sale as then required by law. Place of sale may be either in the county in which the property to be sold, or any part thereof, is situated, or at an office of the Trustee located in the State of Nevada.

(c) The Grantor, Pledgor and Mortgagor of the personal property herein pledged and/or mortgaged waives any and all other demands or notices as conditions precedent to sale of such personalty.

(d) Trustee may postpone sale of all, or any portion, of said property by public announcement at the time fixed by said notice of sale, and may thereafter postpone said sale from time to time by public announcement at the time previously appointed.

(e) At the time of sale so fixed, Trustee may sell the property so advertised or any part hereof, either as a whole or in separate parcels at its sole discretion, at public auction, to the highest bidder for cash in lawful money of the United States, payable at time of sale, and shall deliver to such purchaser a deed conveying the property so sold, but without covenant or warranty, express or implied, Grantor hereby agrees to

surrender, immediately and without demand, possession of said property to such purchaser.

XI. Trustee shall apply the proceeds of any such sale to payment of: expenses of sale and all charges and expenses of Trustee and of these Trusts, including cost of evidence of title and Trustee's fee in connection with sale; all sums expended under the terms hereof, not then repaid, with accrued interest at the rate of ten per cent (10%) per annum; all other sums then secured hereby, and the remainder, if any, to the person or persons legally entitled thereto.

[This is the master form recorded as Document No. 28573, Book R Mtgs., at Page 112, Storey County (CAV4, 741-746) which is incorporated in Document No. 44122, Book 15, at Page 633, Storey County.]

* * *

STOREY COUNTY

Order No.
Escrow No. Foreclosure No. 150055
Loan No.

WHEN RECORDED MAIL TO:

FIRST AMERICAN TITLE COMPANY
Post office Box 531
Reno, Nevada 89504
Attn: Sharon L. Ford

SPACE ABOVE THIS LINE FOR RECORDER'S USE

NOTICE OF BREACH AND DEFAULT AND OF ELECTION TO CAUSE SALE OF REAL PROPERTY UNDER DEED OF TRUST

IN THE MATTER of the Deed of Trust made by JOTI DEVELOPMENT CORPORATION, a Nevada corporation

To FIRST AMERICAN TITLE COMPANY OF NEVADA, formerly NEVADA TITLE GUARANTY COMPANY, Trustee, dated March 28, 1979, recorded April 2, 1979, as Document No. 44122, in Book 15, page 633 of Official Records, in the office of the County Recorder of Storey County, Nevada, securing among other obligations, a note for $1,542,000.00 in favor of LAKE TAHOE RECREATIONAL LAND COMPANY, INC., A Nevada corporation

or order.

NOTICE IS HEREBY GIVEN that a breach of an obligation for which said Deed of Trust is a security has occurred in that there has been a default in the

payment of the sum of $34,007.00 due September 1, 1987 defined as "Short Fall" in that certain Modification Agreement dated September 4, 1985 under Paragraph 5.1; quarterly instalment [sic] in the sum of $47,092.68 due November 1, 1987 together with all subsequent quarterly instalments [sic]; and any and all late charges; advances by beneficiary; taxes and/or assessments due; attorneys fees; foreclosure fees and costs.

The beneficial interest under the above Deed of Trust was assigned to SAN JACINTO SAVINGS ASSOCIATION, a Texas Savings and Loan by Assignments recorded May 27, 1987 in Book 58 at pages 383 thru 397 of Official Records, Storey County, Nevada.

There is now owing and unpaid upon said note the sum of $1,422,061.73 principal, and interest thereon from March 13, 1989

By reason of said breach and default, it is hereby declared that the whole of said unpaid amount of said note and all other sums secured by said Deed of Trust is immediately due and payable, and notice is hereby given of the election of the undersigned to cause the FIRST AMERICAN TITLE COMPANY OF NEVADA as substituted to sell the property described therein in the manner provided in said Deed of Trust, and notice is further hereby given that the undersigned heretofore executed and delivered to said Trustee a written declaration of said breach and default and a written demand for the sale of said property.

Dated: March 28, 1989

STATE OF ~~NEVADA~~ TEXAS]
COUNTY OF]ss.
HARRIS]

On April 7, 1989
before me, the undersigned, a Notary Public in and for said State personally appeared C.A. Mitts, III Sr. Vice President

known to me to be the person whose name subscribed to the within instrument and acknowledged that C.A. Mitts, III executed the same.

WITNESS my hand and official seal.

Signature /s/ Wrendy K. Qualls

SAN JACINTO SAVINGS ASSOCIATION
a Texas Savings and Loan

by /s/ C.A. Mitts, III Sr. V.P.

[SEAL]

(This area for official notarial seal)

Filed for Record at Request of First American Title April 18, 1989 *at* 56 *Min's Past* 10 o'clock A.M. *Recorded in Book* 70 *of Official Records* Page 156-157 *Storey County, Nevada* Mary Jane Rule *Storey County Recorder By* /s/ Margaret Lowther *Deputy Title No.* 63197

[$6.00 fee paid]

APN
004-231-10 thru 16, and 33 thru 40
004-231-57 thru 61
004-231-63,81,82,85,86
004-241-06 thru 13, and 24 thru 27
004-241-29,30,42,43; and 45 thru 49
004-241-61, 62, 65, 82
004-281-01,03,04, and 07 thru 22
004-281-24, and 27 thru 39, and 42

CERTIFIED COPY
The Foregoing Document is a full
true and correct copy of the record
in the office of the County Recorder,
Storey County, Nevada.
Witness my hand and seal this
28th Day of August, 2006
Margaret Lowther, County Recorder

By /s/ Gerri G. Honea Deputy

When recorded, mail to:

Rick Hsu
Maupin, Cox & LeGoy
4785 Caughlin Parkway
Reno, NV 89519 (for Recorder's use only)

NOTICE OF "AGREEMENT AND MODIFICATION OF NOTE SECURED BY DEED OF TRUST" CONTAINING EXTENSION OF PROMISSORY NOTE

(Filed Aug. 28, 2006)

The undersigned is the attorney for S.K. Madan and Shobhana Madan, the successors-in-interest by Assignment to the interest of America Devco, Inc. a

California corporation, successor-in-interest of Lake Tahoe Recreational Land Company, Inc., a Nevada corporation, to that certain note dated March 28, 1979, in the face amount of $1,542,000.00 secured by trust deed recorded on April 2, 1979 as Document No. 44122, Book 15, Page 633 in the Office of the Recorder of Storey County, Nevada, and encumbering lots 418S-519S, inclusive, as shown on that certain Division of Land Map recorded on February 1, 1979, as File No. 43664, in the Official Records of Storey County, Nevada. The undersigned does hereby give notice of the modification and extension of note agreed to between America Devco, Inc. and Joti Development Corporation, a Nevada corporation, which modification and extension is attached hereto as Exhibit 1.

Dated August 28, 2006

/s/ Rick Hsu
Rick Hsu
Attorney for S.K. Madan
& Shobhana Madan

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

On this 28th day of August, 2006, personally appeared before me, Irene D. Flippen, a Notary Public, Rick R. Hsu, personally known to me to be the person whose name is subscribed to the above

instrument who acknowledged that he executed the instrument.

/s/ Irene D. Flippen
NOTARY PUBLIC

[SEAL] IRENE D. FLIPPEN
Notary Public – State of Nevada
Appointment Recorded in Washoe County
No: 99-57690-2 – Expires August 9, 2007

AGREEMENT AND
MODIFICATION OF NOTE
SECURED BY DEED OF TRUST

THIS AGREEMENT, made this 4th day of ~~August~~, JLG SEPT 1985, by and between AMERICA DEVCO, INC., a California corporation, (hereinafter referred to as "Devco"), and JOTI DEVELOPMENT CORPORATION, a Nevada corporation (hereinafter referred to as "Joti").

WITNESSETH:

WHEREAS, on or about March 28, 1979, Joti executed a Promissory Note in favor of Lake Tahoe Recreational Land Company, Inc., a Nevada corporation ("Lake Tahoe") in the original face amount of 1,542,000.00 (the "Note"), secured by a Deed of Trust encumbering certain real property described therein located in Storey County, Nevada (the "Property"), recorded April 2, 1979, in Book 15, Page 633 et seq., as File No. 44122, Official Records of Storey County (the "Trust Deed"); and

WHEREAS, Devco is the successor in interest to Lake Tahoe; and

WHEREAS, Joti is in default under the terms of the Note and Trust Deed in that Joti has failed to pay in full the installments of principal and interest called for in the Note, and the total sum currently in default as of August 15, 1985, is $90,177.72; and

WHEREAS, Joti has proposed modification of certain of the terms and provisions of the Note, and Devco is willing to agree to such modification on the terms and conditions hereinafter set forth;

NOW, THEREFORE, Devco and Joti do hereby agree as follows:

1. Payment of $20,000.

Upon execution of this Agreement, Joti shall pay to Devco, in readily available funds, the sum of TWENTY THOUSAND DOLLARS ($20,000.00), which shall be applied against the outstanding unpaid balance of the Note, first to interest and the remainder, if any, to principal.

2. Collateral Assignment.

Concurrent with the execution of this Agreement, Joti shall execute and deliver to Devco a Security Agreement and Collateral Assignment of the beneficial interest in existing and future deeds of trust encumbering the Property as liens junior to the Trust Deed, such assignment to be additional security for Joti's performance of its obligations under the Note

and Trust Deed; the Security Agreement and Collateral Assignment shall be in the form attached hereto as Exhibit "A" and incorporated herein by this reference.

3. Payment of Taxes.

Concurrent with the execution of this Agreement, Joti shall cause to be paid to the Storey County Tax Assessor all real property taxes, including interest and penalties, if any, then due and payable and constituting a lien against any portion of the Property. In the event any such taxes relate to a portion of the Property fee title to which has been conveyed by Joti to an unrelated third party, and encumbered by one of the junior trust deeds which are the subject of the Security Agreement and Collateral Assignment, Joti shall immediately institute appropriate action to cause the trustor under each junior trust deed to cure its default and pay such delinquent taxes.

4. Modification of Collection Agreement.

Concurrent with the execution of this Agreement, Joti and Devco shall execute and deliver to Valley. Installment Collections, Inc. in Reno, Nevada, the Modification of Master Collection Agreement attached hereto as Exhibit "B" and incorporated herein by this reference.

5. Modification of Note.

Upon performance by Joti of all of the obligations of Joti set forth in Paragraphs 1 through 4, above, the

following modifications of the terms and provisions of the Note shall be effective:

5.1 Commencing September 1, 1985, and continuing until August 1, 1987, principal and interest shall be payable in monthly installments equal to the aggregate of (i) one hundred percent (100%) of all funds received each calendar month by Collector, pursuant to the Master Collection Agreement as modified by Exhibit "B" hereto, up to $10,000.00 in each calendar month, plus (ii) fifty percent (50%) of any sums received by Collector in such calendar month in excess of $12,000.00. On September 1, 1986, and on September 1987, the "Short-Fall" (as hereinafter defined) shall be all due and payable. The Short-Fall shall mean the amount, if any, by which the total aggregate payments made against the Note during the previous 12 twelve calendar months is less than $120,000. Commencing on November 1, 1987, and continuing quarterly thereafter, on the first day of each third month, principal and interest shall be payable in installments of $47,092.68 or more. All unpaid principal and accrued unpaid interest shall be all due and payable on August 30, 1996.

5.2 The amount of $34,206.55, representing the accrued interest through August 15, 1985 owing and unpaid under the Note, less the $20,000 paid pursuant to Paragraph 1, above, shall be added to the unpaid principal balance of the Note effective as of the date of this Agreement, and such additional principal shall thereafter bear interest at the rate of nine percent (9%) per annum until paid.

5.3 Except as herewith specifically modified, the terms and provisions of the Note, and the Trust Deed securing the Note, shall remain unchanged and in full force and effect.

6. Withdrawal of Notice of Default.

Upon execution by all parties of this Agreement and the Security Agreement and Collateral Assignment (Exhibit "A" hereto) and the Modification of Master Collection Agreement (Exhibit "B" hereto), Devco shall cause to be delivered to Collecter [sic] a notice that Joti's default under the Note has been cured.

IN WITNESS WHEREOF, the undersigned have executed this Agreement and Modification of Note as of the day and year first above set forth.

JOTI DEVELOPMENT CORPORATION
a Nevada corporation

By: /s/ John L Gean M.D.

Its: President

AMERICA DEVCO, INC.
a California corporation

By: /s/ Richard P. Carlsberg

Its: President

* * *

SUNSHINE REPORTING SERVICES
151 Country Estates Circle
Reno, Nevada 89511
(775) 323-3411

IN THE FIRST JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF STOREY
HONORABLE WILLIAM A. MADDOX,
DISTRICT JUDGE

– o O o –

IN THE MATTER OF MICHAEL PHILLIP GENTILE, suing on behalf of himself and all other purchasers of Lots 418S through 519S, Pinion Hills,

Plaintiff,

Case No. CV-0019959

TRANSCRIPT OF PROCEEDINGS
Hearing on Pending Motions
July 21, 2006
Virginia City, Nevada

SUNSHINE REPORTING SERVICES
(775) 323-3411 * (775) 883-7950
REPORTED BY: SUSAN CULP CCR #343

* * *

[8] and sale deed from LTRLCO to JOTI with the LTRLCO promissory note back and the LTRLCO deed of trust back. That document – those documents were both dated March 28, 1979.

Some ten years later, there was a notice of default, and that LTRLCO promissory note was accelerated and that debt became wholly due on March 28, 1989.

Six-years later the NRS 111.190.1(b), six years expired, and that would be on March 28, 1995. And four years later on March 28, 1999, the NRS 106.240, ten years expired. I have a later chart and I'm going to expand upon this set of documents that I think will be helpful to the Court.

To complete the chart, we of course then had deeds, individual grant bargain and sale deeds for each member of the class, and in turn, each member of the class gave back as evidence of their indebtedness to the class a promissory note and a credit deed of trust, each individual 50 lots.

I have a subsequent chart expanding upon that particular scenario.

THE COURT: I'll just – if anybody is hot, if they get hot, you can takes your coats off if you want to.

MR. MARTIN: I have one correction to make to my reply brief. I stated therein that I did not have a copy of the LTRLCO promissory note. Indeed in looking back in some old files, I did find a copy and we are working with a copy in the guidance today.

[9] On March 28, 1979, the debt from JOTI to LTRLCO was evidenced by a promissory note in the amount of $1,542,000. On the same date, that debt

was secured by the LTRLCO deed of trust. Specifically within the LTRLCO promissory note which evidences the debt for the 1,542,000 is the following language: Should default be made in payment of any installment when due, the whole sum of principal and interest shall become immediately due at the option of the holder of this note, and we emphasize at the option. The massive lien evidenced by the LTRLCO deed of trust contains the following specific language: For the purpose of securing, two, payment of the indebtedness evidenced by one promissory note of even date herewith and any extension or renewal thereof in the principal sum of 1,542,000. The matching document said no question about which note is being referred to or which debt evidenced by the LTRLCO note is being referred to.

On March 28, 1989, there was a notice of breach and default on the election to cause sale of real property under deed of trust, and in that notice of breach, the option was exercised to accelerate the promissory note which evidenced the debt. The specific language within the breach of – notice of breach of default is: Securing among other obligations a note for 1,542,000 in favor of, and that would be LTRLCO, there is now due and owing and unpaid upon said note the sum of $1,422,061.73 principal and interest thereon [10] from March 13, 1989. By reason of said breach and default it is hereby declared that the whole of said unpaid amount of said note and all other sums secured by said deed of trust is immediately due and payable. And we added

emphasis to immediately due and payable. Thus on March 2, 1989, the debt evidenced by the LTRLCO promissory note was wholly due.

Then the six years elapsed and NRS 11.190.1(b) at that time expired on the debt evidenced by the LTRLCO promissory note, and that date is March 28, 1995, and on that date, the debt evidenced by the LTRLCO promissory note was extinguished.

On the other side of the chart, four more years after that, the NRS 106.240 time, the ten years expired after the debt was wholly due and that date was March 28, 1999.

Then on that point, the lien of the deed securing the agreement of the deed of trust was extinguished. No extensions of the promissory note were ever entered into. No demands were ever made. The Madans recorded, apparently obtained a title to their assignment of the deed of trust on October 24, 1994, and they did not recall it until nine years later on February 2, 2003. And there's no explanation, I'm sure Mr. Hsu will have one, and there's no explanation that anybody knows of for that lapse, for that nine-year lapse.

And then we have the notice of trustee sale which was issued, the first indication of interest on their part in

* * *

[33] be.

And, of course, we need to be allowed to conduct our sheriff sale which has been continued while these proceedings are. And I do remind the Court, that no opposing papers have been filed in case number 85 01166A opposing the sheriffs sale. We certainly – we agreed that – you asked for no sales to take place when you ordered it, and we didn't do it.

Now I – there was one alternative backup here when we talked about Storey County and the class briefing the tax sales issue, and I sort of missed it. But down here with an asterisk, I have that perhaps what we could do with respect to the Storey County tax sale parcels is we could ignore or waive the issue of improper tax sales on the five class member parcels, let the Madans and Mr. Smith and Ms. Kane and Mr. Benkovich have the benefit of their tax sale bargain, and then subsequently make it right with those five class members when, I believe it will be you at some point in time, when we make a recovery will be allocating amongst the class.

And I just have one more peripheral comment. Not peripheral, but I just want to – we had a little bit of excitement last week, Mr. Hsu was bound and determined to ruin my vacation, that reminds me, I'll never tell one of these guys again I'm going on vacation, then they won't file stuff. He promised me he wouldn't and I gave him time to file.

But in any event, over here in chart number two, the [34] magic words on the accelerated debt are "wholly due," and I mention this as an add-on

because Mr. Hsu filed some additional material yesterday which I got to see at 5:00 this morning. But in any event, having read them I got up and said I better make another chart. I couldn't settle with just eight charts, we had to have nine charts. Chart number nine are the words of NRS 106.240, and I should think Mr. Hsu will probably use them when he gets up.

"The lien heretofore hereafter created of any mortgage or deed of trust upon any real property appearing of record and not otherwise satisfied and discharged of record shall at the expiration of 10 years after the debt secured by the mortgage of deed of trust according to the terms thereof or any recorded written extension thereof become wholly due," that's the words we've got there, "wholly due," "terminate and it shall be conclusively presumed that the debt has been regularly satisfied and the lien discharged." That is the statute. That's the circumstances. Wholly due March 28, 1989. The debt evidenced by the LTRLCO promissory note was extinguished on March 28, 1995. Four years later the lien was extinguished on March 28, 1999. And that's the end of it. Now he's done a very wonderful job of torturing the language in the most recent filing, and I'll leave it to him to argue his own language.

Thank you very much, Your Honor. I think I covered

* * *

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL PHILLIP GENTILE, SUING ON, BEHALF OF HIMSELF AND ALL OTHER PURCHASERS OF LOTS 418S THROUGH 519S, PINION HILLS RANCHES, Appellant, vs. S.K. MADAN AND SHOBHANA MADAN Respondents.	**No. 49720** (Filed December 31, 2009)
MICHAEL PHILLIP GENTILE, SUING ON, BEHALF OF HIMSELF AND ALL OTHER PURCHASERS OF LOTS 418S THROUGH 519S, PINION HILLS RANCHES, Appellant, vs. S.K. MADAN, AN INDIVIDUAL; SHOBHANA MADAN, AN INDIVIDUAL; AND STOREY COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, Respondents.	**No. 49747**
MICHAEL PHILLIP GENTILE, Appellant, vs. S.K. MADAN and SHOBANA MADAN Respondents.	**No. 49749**

STEWART H. PARKER, TRUSTEE OF THE STEWARD H. PARKER AND MARGERY L. PARKER REVOCABLE TRUST DATED 5/15/92 Appellant, vs. S.K. MADAN and SHOBANA MADAN Respondents.	**No. 49753**

APPELLANTS' PETITION FOR REHEARING

Appeal from the First Judicial District Court of the State of Nevada in and for the County of Storey, The Honorable William A. Maddox, District Judge, presiding.

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LEGEND

AOB or The Class Brief	= The Appellants' (The Class) Opening Brief
ARB or The Class Reply Brief	= The Appellants' (The Class) Reply – Answering Brief
Class Appendix Volume ("CAV_")	= NRAP 30(b) – Appellant's Opening Brief Appendix

Appellants respectfully petition for rehearing pursuant to NRAP 40. This Petition is based upon the Order of Affirmation filed by This Court on December

16, 2009. It is respectfully submitted that, in Appellants' opinion, The Court has overlooked or misapprehended certain points of law and fact that are set forth briefly and with particularity in the following summary.

1. SUMMARY: FACTS AND LAW OVERLOOKED OR MISAPPREHENDED

This Court:

1.1 Misapprehended NRS 106.240 by reading language into the statute – inserting "according to terms *on the face of*" in place of the plain language in the statute, "according to the terms *thereof*." **NRS 106.240; Order of Affirmance, filed December 16, 2009. ARB, 2 at lines 16-28; ARB, 3 at lines 1-28; ARB, 4 at lines 1-7; ARB, 17 at lines 17-28; ARB, 18 at lines 1-28; and ARB,19 at lines 1-5.**

1.2 Overlooked the wholly due date in the Promissory Note that triggered NRS 106.240, contrary to This Court's finding of facts in Pro-Max. *Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 94, 16 P.3d 1074, 1077 (2001). **ERRATA TO APPELLANTS' REPLY – ANSWERING BRIEF, iii; ERAV1, 65; CAV5, 801 and CAV4, 736.**

1.3 Overlooked the acceleration clause in The Promissory Note and The Deed of Trust which established a new wholly due date and extinguished the then unrecorded extension agreement. **CAV4,**

615-624; CAV4, 626-627; CAV5, 801; CAV5, 809; AOB, 7 at lines 7-28 and AOB, 8 at lines 1-16.

1.4 Overlooked that, according to NRS 106.240, the debt had been satisfied and the lien extinguished before an extension was recorded. **CAV4, 626; CAV5, 919; AOB, 24 at line 27 and AOB, 25 at lines 1-6.**

1.5 Overlooked the general practice in Nevada of NOT having maturity dates in deeds of trust. **CAV4, 615; ARB, 8 at lines 1-28 and ARB, 9 at lines 1-11.**

1.6 Overlooked This Court's own mandate to construe statutes to harmonize statutes covering the same subject – in this case, deeds of trust. **ARB, 17 at lines 21-28 and ARB, 18 at lines 1-16.**

2. ARGUMENT

2.1 In its Order filed on December 16, 2009, This Court held that NRS 106.240 is clear and unambiguous and that language *cannot* be read into the statute. The Court then interpreted the statute to state that the wholly due date triggering NRS 106.249 must appear *on the face of* the Deed of Trust, language that is not in the statute. Thus, The Court itself read language into the statute to determine that "the recorded deed of trust did *not* contain a wholly due date in its terms." In so doing, This Court contradicted its finding of facts in *Pro-Max*, supra in which it found the wholly due date (trigger date) in the Promissory Note. There is no language in the statute requiring the wholly due date to appear on

the face of the Deed of Trust. To inject such language renders NRS 106.240 meaningless because in Nevada the wholly due date is found in the Promissory Note, not the Deed of Trust. **ARB, 8 at lines 1-28 and ARB, 9 at lines 1-11.** This misapprehension led to a series of facts overlooked.

2.2 In the Gentile case, This Court held that there was no due date in the Deed of Trust. However, both the Pro-Max and the Gentile deeds of trust contain standard language incorporating a promissory note. In *both cases*, the original wholly due date was given in the promissory note and NOT in the deed of trust. **AOB, 7 at lines 8-21; ERRATA TO APPELLANTS' REPLY – ANSWERING BRIEF, iii and ERAV1, 65.**

2.3 The Pro-Max (a standard title company short form) deed of trust contained the following language incorporating a Promissory Note.

> "For the purpose of securing (1) payment of the sum of $293,938.78 with interest therein according to the terms of the promissory note or notes of even date herewith made by Trustor, payable to order of Beneficiary, and all extension or renewals, thereof; . . . "

In its finding of facts in *Pro-Max*, supra, This Court held that:

> "Pro-Max executed promissory notes to the shareholders, secured by deeds of trust on Pro-Max's interest in the Verdi property. *The notes were executed on May 11, 1981 and*

> *became due two years later on May 14, 1984* . . . Although the shareholders and Pro-Max were purportedly unaware of it at the time, NRS 106.240 operates to extinguish any debt upon real property secured by a deed of trust ten years after the debt becomes due unless an extension is written and recorded. *The notes were therefore extinguished by operation of the statute on May 14, 1994." Pro-Max*, supra. (emphasis added).

2.4 Similarly, the Gentile (standard title company short form) Deed of Trust contains standard language incorporating a Promissory Note and additional terms.

> "For the Purpose of Securing: 1. Performance of each agreement of Trustor incorporated by reference or contained herein. 2. Payment of the indebtedness evidenced by one promissory note of even date herewith, any extension or renewal thereof, in the principal sum of $1,542,000.00, executed by Trustor in favor of Beneficiary of order . . . " **AOB, 7 at lines 22-28; AOB, 8 at lines 1-16 and CAV4, 615-624.**

2.5 In the Gentile case The Promissory Note was executed on March 28, 1979, and became due twelve years later on August 30, 1991. As in *Pro-Max*, supra, This Court should have recognized the wholly due date provided in The Promissory Note; it is inconsistent not to do so. Thus, August 30, 1991 was the original trigger date for NRS 106.240, so that the lien was *therefore extinguished by operation of the*

statute on August 30, 2001, and The Deed of Trust was no longer viable at that point in time. **AOB, 6 at lines 11-17; AOB, 9 at lines 4-28; ARB, 10 at lines 1-2; ERRATA TO APPELLANTS' REPLY – ANSWERING BRIEF, iii and ERAV1, 65.**

2.6 In theory, the phrase "any recorded, written extension thereof" may apply; in this case it does not. To state the obvious, one cannot extend a note that has been conclusively presumed regularly satisfied. There is nothing to extend. No extension had been recorded prior to August 30, 2001. In fact the extension was not recorded until August 28, 2006, five years after time ran out. It does not make any legal sense to recognize an extension recorded after the 10 year period had expired, nor is it consistent with the intent of NRS 106.240. **AOB, 13 at lines 4-10.**

2.7 This Court also overlooked the valid acceleration term of The Deed of Trust that, in addition to The Promissory Note, also established a wholly due date. A term allowing for acceleration can be found in both The Deed of Trust and The Promissory Note. It was incorporated into The Deed of Trust by reference; it appears on the face of The Promissory Note. There is no language in NRS 106.240 that says that only the terms that are written out *on the face of* The Deed of Trust are to be recognized. The plain language is "according to the terms thereof." Thus, Mr. Gentile maintains that the acceleration clause operated as a "term thereof" and accelerated the wholly due date to March 28, 1989 triggering NRS 106.240. It specifically extinguished the unrecorded extension. This

Court and The District Court overlooked this trigger date which caused the lien to be discharged 10 years later, on March 28, 1999. **AOB, 9 at lines 4-28 and AOB, 10 at lines 1-2.**

2.8 To reemphasize, the extension was not recorded until August 28, 2006, more than seven years after the note had been extinguished (according to the trigger date in The Notice of Default and the plain language of NRS 106.240). It makes no legal sense to recognize an extension of a lien that had already been discharged. **ARB, 11 at lines 18-23; ARB, 12 at lines 1-28 and ARB, 13 at lines 1-13.**

2.9 To declare that the Extension can be binding but that the other legal terms of The Deed of Trust have no standing creates a contradictory, logic-defying situation. By its affirmation The Court is holding that the Extension is used to declare that The Deed of Trust is still good, and The Notice of Default (which was overlooked by The Court as a legal term of The Deed of Trust and which extinguishes the Extension wholly due date) must then be used to foreclose on the property. It is inconsistent to hold that The Notice of Default has legal standing in the one instance and not in the other. **NRS 107.0803; ARB, 10 at lines 12-28 and ARB, 11 at lines 1-16.**

2.10 Given the terms of The Deed of Trust, there are two wholly due dates that could serve as the trigger for NRS 106.240 in the Gentile case. Consistent with *Pro-Max*, supra, one of these is the wholly due date in The Promissory Note. The other is the

wholly due date in The Notice of Default. If the Court objects to the use of an accelerated wholly due date, then it should still recognize the trigger date in The Promissory Note, as it did in *Pro-Max*, supra.

2.11 This Court overlooked Gentile's objections to the viability of the extension agreement that went beyond the fact that to be recorded it had to be authenticated. There are two valid reasons that the wholly due date in the extension should *not* be recognized. First, the ten year period triggered by NRS 106.240, using either The Promissory Note due date or The Notice of Default due date, was reached before the extension agreement was recorded. The note had been extinguished; there was no lien to extend. To maintain the purpose and integrity of NRS 106.240, *any extension should be written and recorded before the ten-year period triggered by the wholly due date of record is reached.* Second, The Notice of Default, which was recorded, extinguished the then unrecorded extension agreement and its due date. **CAV4, 626-627; AOB, 9 at lines 4-28 and AOB, 10 at lines 1-2.**

2.12 The Court overlooked its own mandate to construe and harmonize statutes in a statutory scheme. The Court overlooked the "deed of trust" definition in NRS 40.433, the incorporation in the standard form deed of trust of the NRS 107.030 covenants and master forms, and the specific provision for the exercise of acceleration clauses in NRS 107.080.3. **ARB, 17 at lines 17-28; ARB, 18 at lines 1-28 and ARB19 at lines 1-5.**

2.13 The Order of Affirmance sets precedents that go beyond The Gentile Case. By reading language into the statute,

- It renders NRS 106.240 meaningless. Since Nevada rarely, if ever, has a maturity date in the deed of trust, there is never an occasion when NRS 106.240 would be "triggered" unless through an extension of the date in The Promissory Note.

- It contradicts This Court's finding of fact in *Pro-Max*, supra, causing confusion about whether the wholly due date in a promissory note does or does not trigger NRS 106.240.

- It calls into question whether terms of a standard form deed of trust that are incorporated by reference have legal standing.

- It opens the door to challenges to due dates established by any of the standard terms incorporated into deeds of trust, such as default and due on sale acceleration clauses.

- It declares that extension agreements are still binding after NRS 106.240 has run its course and extinguished a given debt, as well as after the date in an extension agreement has been extinguished by the enactment of another term, such as a default or due on sale clause.

- It renders acceleration clauses meaningless in the face of legislative action which recognizes them (NRS 107.080.3) and a line of This Court's own cases which recognize them. **AOB, 14, at lines 1-27,**

AOB, 15, at lines 1-28, AOB, 16, at lines 1-28, AOB, 17, at lines 1-17.

• If acceleration clauses are not valid terms in a promissory note and deed of trust, and accelerated due dates are not considered valid wholly due dates, then the following section of NRS 107.087.3 is meaningless.

> " . . . The notice of default and election to sell must describe the deficiency in performance or payment and *may contain a notice of intent to declare the entire balance due if acceleration is permitted by the obligation secured by the deed of trust . . .* " NRS 107.080.3. (emphasis added).

3. CONCLUSION

3.1 The plain and simple language of NRS 106.240 states that a lien is discharged at the expiration of 10 years after the debt secured by a deed of trust according to the terms thereof become wholly due. It does not say that the triggering date must be on the face of the deed of trust. The Court injected language that is not there, contradicting its finding in *Pro-Max*, supra, in which it found the wholly due date in The Promissory Note. This holding renders NRS 106.240 meaningless because the vast majority of deeds of trust in Nevada do not contain a wholly due date; it is found in The Promissory Note, as this Court recognized in *Pro-Max*, supra. The Court overlooked the original wholly due date in The Promissory Note that, absent The Notice of Default,

would have triggered NRS 106.240. It overlooked The Notice of Default that also contained a wholly due date, triggering NRS 106.240. It further overlooked the fact that the extension was recorded after the ten year period had expired for both the original wholly due date on The Promissory Note date and the accelerated wholly due date, a term of The Deed of Trust as well as The Promissory Note. An extension should not be legally binding when it is not recorded, as required by NRS 106.240, until years after the lien has been discharged.

3.2 In *Pro-Max*, supra, This Court issued an Order. That Order was withdrawn on a petition for rehearing. The Court looked at the terms of the Pro-Max Deed of Trust, then applied plain and simple language of NRS 106.240 to the deed of trust terms (the incorporated promissory note) in its new opinion. This Court has a very similar situation for The Gentile case.

3.3 Mr. Gentile respectfully requests that The Court reconsider its Order of Affirmance and:

- Recognize that either the wholly due date in The Promissory Note or that in the Notice of Default triggered NRS 106.240, and that the debt was regularly satisfied and the lien discharged before any extension was recorded.

- Determine that the extension is invalid because it was not recorded before the lien was discharged and/or because it was extinguished by the Notice of Default.

- Determine that The Deed of Trust is no longer valid.

3.4 Mr. Gentile further respectfully requests that The Court publish its Order of Affirmation, if it still stands, so that the Legislature, the legal profession, the lending institutions, and borrowers are informed about This Court's interpretation of NRS 106.240 and the effect that has on terms incorporated into a Deed of Trust by reference, as well as the construction of terms in a Deed of Trust.

4. ATTORNEY'S CERTIFICATE

I hereby certify that I have read this Appellant's Petition for Rehearing, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Appellant's Petition for Rehearing complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying Appellant's Petition for Rehearing is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 31st day of December, 2009

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